

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

In the Matter of)	
)	
Game Show Network, LLC,)	
Complainant,)	MB Docket No. 12-122
)	File No. CSR-8529-P
v.)	
)	
Cablevision Systems Corp.,)	
Defendant.)	
)	
)	

DIRECT TESTIMONY OF MICHAEL EGAN

I, Michael Egan, hereby swear and affirm as follows:

I. INTRODUCTION

1. I have been asked by counsel for Cablevision Systems Corporation (“Cablevision”) to assess, from a programming expert’s perspective, the claim made by Game Show Network, LLC, (“GSN”) in its Program Carriage Complaint filed October 12, 2011 (“Complaint”) and in its Reply filed January 17, 2012 (“Reply”) that its cable network, GSN, is and was “similarly situated” with WE tv and Wedding Central in programming content and audience. I have also been asked to respond, as appropriate, to the opinions offered by Timothy Brooks and Hal J. Singer in this proceeding, including as set forth in the Declaration of Timothy Brooks dated November 19, 2012 (“Brooks 2012 Decl.”) and the Expert Report of Hal J. Singer, PH.D. dated November 19, 2012 (“Singer Report”).

II. QUALIFICATIONS

2. I have worked in the cable television industry for more than 30 years, first entering the business in 1979 with Satori Productions, a New York City-based television

production company, where I soon became Producer and Production Manager. I joined the cable television multiple system operator Cablevision Industries (“CVI”) in 1980, working there until 1996. My initial position was corporate Director of Programming, and with the continued expansion of my responsibilities, I became Senior Vice President of Programming and Product Development and a member of the senior management team. During my tenure with the company, CVI grew from 38,000 to 1.25 million customers, becoming the eighth largest cable operator in the United States, owning and operating cable systems in 16 states.

3. As a senior executive at CVI, I was involved in all aspects of cable operations and strategic planning, from policy development to system builds and purchases to content acquisitions and investments. Regarding content specifically, I had the senior responsibility for the company for the negotiation of and company-wide compliance with hundreds of affiliation agreements encompassing license fees, marketing support, retransmission consent, carriage requirements, and other arrangements with cable networks and broadcast programmers. I also supervised all aspects of channel lineup development and revision, product tiering, advertising sales, and copyright administration; managed the company’s introduction of new products; and led CVI’s investments in the start-up cable networks Golf Channel, Food Network, and Sunshine Network. As head of TV production activities for the company, I was responsible for all regional television studios and local programming departments. Through the years, CVI won many honors for excellence in production and programming from local and national organizations, including NCTA, NFLCP, and local Emmys.

4. In 1996, I co-founded Renaissance Media, LLC (“Renaissance”), which acquired a number of cable systems in partnership with private equity investors. In addition to my involvement in devising the business plan and the partnership structure, raising capital, and

analyzing and bidding on cable properties for Renaissance, I led corporate and field operations in programming, new product development, and advertising sales.

5. During my 19-year tenure at CVI and Renaissance, I worked continuously with programmers as they sought my feedback on and involvement with their plans for network launches, proposed programming and/or branding evolutions of existing networks, and argued for distribution or revised business arrangements to address dynamic marketplaces. I also led all CVI research efforts in the programming, advertising sales, pay per view, and new product development areas.

6. After the sale of the Renaissance properties in 1999, I founded Renaissance Media Partners, LLC, offering strategic analysis and business development expertise to multichannel video programmers and distributors as well as technology companies. Projects have included: providing strategic analysis and recommendations to national cable programming networks, both multi-network media companies and independent national cable networks; developing company-wide program carriage analyses and recommendations for three of the top-five cable MSOs; designing and implementing cable system operational turnaround strategies for an independent cable system operator; conducting extensive brand research, programming development, and affiliate agreement negotiations for the regional expansion and national launch of an independent programming network; and providing product and business development services to three interactive television companies. In addition, I led the development of a new, national museum that opened to great acclaim, winning several industry awards for its cutting-edge multimedia productions.

7. In addition to this proceeding, in which I previously provided a declaration and a Supplemental Declaration, I have also provided expert witness services to the major college and

professional sports leagues before the U.S. Copyright Office as well as to Comcast Cable Communications, LLC and Time Warner Cable, Inc. (including in the following FCC proceedings: *Herring Broadcasting, Inc. d/b/a Wealth TV v. Time Warner Cable, Inc.*, *Bright House Networks, LLC, Cox Communications, Inc., and Comcast Corporation; Tennis Channel, Inc. v. Comcast Cable Communications, LLC*; and *Bloomberg L.L.P. v. Comcast Cable Communications, LLC*).

III. METHODOLOGY

8. In the course of this research and analysis, I reviewed a large quantity of material, virtually all of which I identified and selected. I obtained much of it directly, independent of Cablevision, such as the 2009, 2010, and 2011 daily programming schedules for GSN and the 2009 schedule for WE tv, press releases and show information from GSN's and WE tv's web sites and multiple other online sources, articles from general public and trade publications, and numerous books (textbooks and the like) written by scholars and critics on the subjects of TV genres and TV production. The balance of the materials were obtained in response to my requests, such as the 2010 and 2011 WE tv daily programming schedules, WE tv's presentations to advertisers and affiliates, its internal tracking reports, ratings and qualitative research data from Nielsen and MRI, Cablevision's Audience By Network reports, a list with descriptions of all shows aired on WE tv from 2009 through 2011 and the same for Wedding Central for 2010, and many GSN and WE tv documents produced in discovery.

9. As will be discussed later in this testimony, I also watched a great deal of the programming aired on each network between 2009 and 2011. This included dozens of DVDs of specific WE tv and GSN shows I identified and requested of counsel and GSN and WE tv shows sourced online. In addition, I selected and recorded on my DVR a week of primetime

programming of each network (November 8 – 14, 2011) and several additional hours of WE tv (January 14 – 16, 2013) for my review in my office. In total, I personally watched all or parts of *multiple* episodes of 26 different WE tv series, movies, and specials and 27 different GSN series and specials. The full-length episodes that I watched encompassed 24 hours of WE tv airtime and 31.5 hours of GSN airtime. I also viewed more than 120 minutes of online clips of shows, sizzle reels for each network for each of 2009, 2010, and 2011 that were played at the annual upfront advertiser presentations, and an additional four sizzle reels found on the WE tv website that were played at the annual National Cable TV Association conventions.

10. I have personally performed the overwhelming majority of this work, and I also employed the services of a long-time industry programming colleague to assist in certain aspects of the work under my direct supervision. A list of the materials I relied on in preparing this written direct testimony is attached as Appendix A.

11. I provide my expert opinion with respect to certain issues relevant to this matter based on my experience as a cable television system owner and operator, independent programming executive and media producer, teacher of high school and college level television and radio courses, expert witness in several program carriage-related FCC proceedings, and my review of the FCC's Second Report and Order¹ as well as the materials and all other sources noted herein.

¹ See *Leased Commercial Access; Development of Competition and Diversity in Video Programming Distribution and Carriage*, MB Docket No. 07-42, Second Report and Order, FCC 11-119 (rel. Aug. 1, 2011) ("*Second Report*"). All references to "CV Exh. __" are to exhibits on Cablevision's Exhibit List. These materials, and all other materials relied upon, are also listed at Appendix A to this testimony.

IV. SUMMARY OF CONCLUSIONS

12. My conclusions are:

(a) **Programming.** GSN is today and at least since 2009 has been extremely dissimilar in programming content to WE tv and Wedding Central (prior to its termination in July 2011). In fact, the degree of dissimilarity between GSN and each of WE tv and Wedding Central is and was unusually large compared to that between WE tv/Wedding Central and most other major non-sports, non-news basic cable networks programmed for adult audiences.

(i) **Genre.** The genres carried by the two networks are distinct. During the period I examined, WE tv is Reality, Drama, Comedy, Movie, and News genre programming for 93% of its broadcast day, while GSN is Game Shows and Gaming genre programming for 98% of its broadcast day.

(ii) **Target Programming.** The target programming of the two networks is and was distinct. WE tv seeks to acquire and display content for and about women in their family-centered ages of 18-49 and 25-54 with an emphasis on weddings, raising children, and being part of a family (or group that functions as a family), all told from a distinctly female point of view. On the other hand, GSN primarily displays programming for those adults, *both* men and women, seeking to play along with a Game Show or poker Gaming contest.

(iii) **Programming Expenditure.** Programming expenditure is a measure that can provide insight into the valuations of cable network

content by both buyers and sellers in the marketplace. WE tv spent an average of [REDACTED] annually in 2010 and 2011, while GSN spent [REDACTED], an average of only [REDACTED]. Moreover, judged by industry averages, GSN invests far less in programming each year than the other cable networks with a similar number of subscribers, falling short of their averages for both total dollars spent and per-subscriber expense by more than [REDACTED].

(b) **Flaws In GSN’s Discussions Of Programming Similarity.** GSN and its experts fail to provide an authentic investigation and analysis of programming similarity. Instead, in an effort to equate the Game Shows on GSN with the family and romantic relationship-themed Reality shows on WE tv, they virtually ignore the other nine (of 10) genres aired on WE tv and:

(i) forgo both the genre and target programming analyses specified by the *Second Report*, proclaiming a genre analysis to be relatively unpersuasive in this case;

(ii) rely on a grossly insufficient amount of data, consisting of simply naming a total of just nine of the 66 unique program series and specials aired on GSN from 2009 through 2011 and only eleven of the 260 unique programs WE tv ran during those three years;

(iii) invent a sweeping and non-distinguishing new genre they call “relationship” and boldly deny the existence of the long-standing Reality genre;

(iv) fail to provide any objective analysis or third party support for GSN's allegation that the three specific Game Shows named are similar to three of WE tv's Reality shows, a claim that collapses immediately upon scientific examination; and

(v) seriously misrepresent the content on the two networks, alleging, without substantiating, that Game Shows especially appeal to "women." Moreover, they fail to demonstrate that Game Shows appeal to the specific group of women between the ages of 18 – 49 and 25 – 54 which GSN claims to be the shared target audience for whom the networks compete and who define the supposed similarity in audience. And, GSN implies that the two networks have carried similar amounts of Reality and competition-focused shows when the facts make it obvious that the networks differed almost entirely in the amount of each type aired.

(c) **Audience.** GSN is and was very dissimilar in audience to WE tv and Wedding Central as is evidenced by the target audiences and actual viewing audiences of the networks.

(i) **Target Audience.** The Second Report specifies the consideration of target audience (that is, the audience the network is actively seeking to attract). Although the Complaint alleges that the networks share and compete for a single common target audience of Women 25 - 54 (GSN later added Women 18 - 49), the factual evidence does not support that claim. WE tv has very publicly communicated a single, consistent, and narrow target audience of Women 18 – 49 and

Women 25 - 54 via its tightly-focused programming, web site, branding, public relations, affiliate sales, and advertising sales efforts as did Wedding Central prior to its termination in 2011. Simultaneously, overall, GSN has programmed for, branded itself with, and consistently promoted in public and private a much broader primary target audience of Game Show and poker Gaming enthusiast Adults 18+ (men *and* women).

(ii) **Actual Viewing Audience** (those people actually watching). Even just looking at female viewers, GSN attracts a far older female audience than WE tv. *While Women 18 – 49 and 25 – 54 constitute the majority of WE tv’s total adult audience, they make up less than [REDACTED] of GSN’s audience.* In fact, the majority of GSN’s adult audience is composed of female senior citizens: [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED] As a result, in the specific audience demographics (“demos”) claimed by GSN to be shared and competitive with WE tv, Women 18 – 49 and Women 25 - 54, WE tv achieves ratings more than [REDACTED] times those of GSN. Not surprisingly, WE tv’s rating superiority completely disappears at the Women 65+ age group where GSN draws ratings [REDACTED] times those of WE tv.

Moreover, contrary to GSN's claim, it has little of significance in common with any member of its fabricated "core group of 'women-targeted' cable networks", other than Hallmark Channel's heavy audience skew to older women.

(d) **Flaws In GSN's Discussions Of Audience Similarity.** GSN and its experts fail to provide an objective investigation and analysis of audience similarity.

(i) They do not analyze target audience, instead conflating it with actual viewing audience, while at the same time carefully avoiding a consideration of how well GSN's actual viewing audience measures up to the important age component of its claimed target demo.

(ii) The undisputed reality is that 97% of Cablevision's subscribers in the systems where GSN was repositioned reside in the New York DMA. But rather than focus on *local* NY DMA research which portrays the viewing of *Cablevision's subscribers*, GSN and its experts attempt to divert the discussion by their extensive use of unrepresentative *national* ratings. In a similar tactic, they heavily rely on the broadest possible units of viewing measurement – households and persons and, occasionally, "women 18+" (as if all ages of women were the same) - rather than the units constituting 100% of the substance of GSN's audience claim, the allegedly-shared female 18 – 49 and 25 – 54 audience targets.

(iii) GSN and its experts cavalierly dismiss large and meaningful differences in both national and local ratings for WE tv and GSN in the allegedly competitive demos without providing factual

justifications for doing so. Moreover, the snippets of ratings for WE tv and GSN among Cablevision's households presented by GSN's expert are anomalies, carefully-selected fragments of one quarter of 2010 that do not represent the networks' performances for 2009 or 2010. In addition, the GSN ratings Mr. Brooks quotes are significantly higher than those I obtained for the same territory. As a result of these problems, the clips portray GSN in a far more favorable light relative to WE tv than it actually earned for either year.

(e) **The Beta Research Corporation Cable Network Study.** The study GSN's expert, Mr. Brooks, relies on is not relevant to the inquiry at hand. Mr. Brooks describes this study as widely used to measure subscriber satisfaction. In reality, it is neither a subscriber satisfaction survey nor a study frequently sought and used by multichannel video programming distributors ("MVPDs"). Moreover, not even one of the respondents in this national study was a Cablevision customer in the pertinent, NY, market. As a result of these failings, the Beta Research study bears no relevance to Cablevision and its customers. And Mr. Brooks has no basis for projecting results from this unrepresentative, national sample to Cablevision's NY cable system subscribers.

(f) **Price Per Rating Point Or Ratings-Adjusted Price.** The "price per rating point" and "ratings-adjusted price" formula adapted and relied on by GSN's expert Dr. Singer to argue that GSN is appropriately priced to Cablevision is factually incorrect and has no relevance to Cablevision's real-world, business considerations when making cable network evaluations and carriage decisions. Because this calculation is wholly dependent on ratings, and MVPDs typically place equal or greater importance on

multiple other factors, it grossly misstates Cablevision's business imperatives, is unsuited for the purpose proposed for it by GSN and Dr. Singer, and is not an MVPD operating tool or standard.

V. THE PROGRAMMING ON GSN IS NOT AND WAS NOT SIMILAR TO THAT ON WE tv AND WEDDING CENTRAL

13. Based on my experience, I believe that the analysis of whether or not GSN and WE tv/Wedding Central are/were similar in programming content should examine the fundamental factors of *genre* and *target programming*, as specified in the FCC's Second Report, as well as *programming expenditure*.

A. GSN Is Not Similar In Genre To WE tv.

1. **WE tv devoted 93% of its broadcast hours to its top five genres of Reality, Comedy, Drama, Movie, and News while GSN aired content of those genres in less than 3% of its airtime. WE tv offers programming in 10 different genres while virtually all of GSN's programming is found in just two genres.**

14. The term genre typically refers to groupings of literature, art or entertainment works by imitative form.² These forms include, but are not limited to, narrative structure (for example, the hero always investigates the crime in a Police Drama), setting (westerns and Medical Dramas are obvious examples), and convention (a contest of luck and skill featuring prizes is a conventional setup and tipoff of a Game Show, for example).³ According to the Museum of Broadcast Communications's *Encyclopedia of Television*, "Television users and audiences are familiar with uses of the term (genre) that appear in popular television criticism, in programming strategies and schedules, and in the common designations found in newspaper and

2 Arthur Asa Berger, "Genre", *Encyclopedia of Television* (1st Ed.), <http://www.museum.tv/eotvsection.php?entrycode=genre>.

3 Jason Mittell, "Genre", in Horace Newcomb, ed., *Encyclopedia of Television* (Second Edition)(New York, Fitzroy Dearborn, 2004), ("Mittell"), p. 971.

magazine listings.”⁴ Some very commonly cited TV genres are: Game Show, Reality, Comedy, News, Talk, and Drama.

15. A few genres are extremely broad. Over many years, TV producers have developed multiple forms within those very broad genres, each of which is well-defined and differentiated, and have robustly exploited them such that these categories have become widely known as their own genres. For example, the Drama genre contains the long-standing police, science fiction, and period or costume genres (among others); the Comedy genre includes the Sitcom, stand-up, and sketch Comedy genres; and the News genre offers news reporting and analysis as well as public affairs. Some other TV genres are, to varying degrees, more narrow in scope, relying on only modest deviation from consistent, defining characteristics, and as a result, have spawned very few (if any) well-recognized genres to date. The Reality and Game Show genres are examples of the more narrow scope, and therefore, are readily recognizable as distinct and standalone genres.

16. While creative works routinely share some traits (for example, themes, subject matters, and humor), distinguishing among them by their dominant attributes to arrive at a categorization by genre has long been a standard and accepted practice of scholars and experts. As the *Encyclopedia of Television* explains, in the *study* of television, genre criticism is a major approach, one often used to classify programs, and, for those who *produce* television shows, the term is absolutely central to the organization and structure of the production industries:

[G]enre is used to organize the actual production process. Half-hour situation comedies are generally produced inside studios, before live audiences, with multiple cameras using either film or videotape to capture a script performed in sequence, line by line, scene by scene... By contrast, one-hour action programs, melodramas, courtroom or hospital stories, are shot out of sequence, on location, with a single camera. These productions -- actually small, one-hour movies --

4 <http://www.museum.tv/eotvsection.php?entrycode=genre>.

*move from script to completed production in seven to nine days, again with additional time required for post-production. Even the scripts for half-hour comedies and one-hour programs are formatted differently on the page. It is easy to understand, then, why genre affords a handy organizational structure for the television industry.*⁵

17. Because GSN and its experts seek to blur distinctions between the Reality and Game Show genres in order to support their arguments of similarity, I provide a detailed description of the essential qualitative elements of the Game Show and Reality show genres so that the Court may distinguish between them. To provide an objective, fact-based list of defining attributes, I reviewed published, analytical scholarship and criticism about the genres and also drew upon my industry programming and production experience as well as my teaching experience at the S. I. Newhouse School of Public Communications at Syracuse University where I taught television and radio writing, announcing, and production, including for Game Shows. Those published resources include both the online and print editions of the Museum of Broadcast Communications' *Encyclopedia of Television*,⁶ a popular college textbook entitled *Media Programming: Strategies and Practices*,⁷ a textbook I used while teaching a course in broadcasting, *Television and Radio*,⁸ *TV Game Shows* by Maxine Fabe,⁹ a scholarly exploration of the Game Show form, *Daytime Television Gameshows and the Celebration of Merchandise: The Price Is Right*,¹⁰ and an often-referenced college textbook, *TV Culture*.¹¹

5 <http://www.museum.tv/eotvsection.php?entrycode=genre> (emphasis added).

6 See <http://www.museum.tv/publicationssection.php?page=520>, and, Horace Newcomb, editor, *Encyclopedia of Television* (New York: Fitzroy Dearborn, 2004).

7 Susan Tyler Eastman and Douglas A. Ferguson, *Media Programming: Strategies and Practices* (Boston, MA: Thompson Wadsworth, Eight Ed. 2009). ("Eastman and Ferguson").

8 Giraud Chester, Garnet Garrison, and Edgar Willis, *Television and Radio* (Englewood Cliffs, NJ, Prentice-Hall, Inc., Fourth Ed 1971).

9 Maxine Fabe, *TV Game Shows* (Garden City, New York, A Dolphin Book, 1979) ("Fabe").

10 Morris B. Holbrook, *Daytime Television Gameshows and the Celebration of Merchandise: The Price Is Right*, (Bowling Green State University Popular Press, 1993) ("Holbrook").

11 John Fiske, *Television Culture* (London, Great Britain, Routledge, 1987) ("Fiske").

18. Like the Sitcom and action programs described above by the *Encyclopedia of Television*, the Game Show genre¹² has several defining attributes, and a Game Show will exhibit most or all of them:

- **A competition.** As noted by Jason Mittell in the *Encyclopedia of Television*, the essential organizing characteristic of a Game Show is that it is a *contest* (a “game”) with winners and losers (and prizes).¹³ In the large majority of cases, the game is based on everyday and academic knowledge or human/social knowledge of a specific person or persons. Fiske cites *The Price is Right* as an example of the former and *The Newlywed Game* and *Family Feud* (both staples of GSN’s lineup) as examples of the latter type of knowledge.¹⁴ In a minority of cases, the game is based on other challenges, often physical.
- **A scripted show.** All or virtually all of the action is strictly controlled by the show’s producer and emcee. Each episode repeats the same segment order and content.¹⁵ The emcee opens the show, introduces the players, runs the game, awards the prize, and closes the show.
- **An omni-present host or master of ceremonies** (“emcee”) who is the star personality of the show, a genial host, and a stern (but fair) schoolmaster-examiner. He/she is guardian of this knowledge and uses its possession as a means of controlling the competitors and the progress of the game.¹⁶

12 As the *Encyclopedia of Television* explains, the Quiz show scandal of 1958 motivated a change of name for this genre from Quiz show to Game Show. See <http://www.museum.tv/eotvsection.php?entrycode=quizandgame>.

13 Mittell, p. 971.

14 Fiske, pp. 265, 267, 268; Holbrook pp. 37 – 41.

15 Fiske, p. 265.

16 Fiske, p. 267; Holbrook pp. 67 – 72. A similar description of the outsized role of the Game Show emcee is contained in *TV and Radio Broadcasting* by Chester, Garrison, and Willis in its section on Game Shows (at 393); “The personality of the MC is a vital factor in the success of such shows...he must inspire the confidence

- **Simple and highly formalized production techniques**¹⁷ of switching between multiple, fixed-place cameras. The show segments are usually recorded in the same sequence as they will be seen, resulting in little to no post-production editing being required. The productions are generally so rudimentary that, as Fiske points out, five or six episodes are typically taped in one day's recording session.¹⁸
- **The repeated use of a single set in one location** for all, or virtually all, of the shows.¹⁹ Typically, this is in a studio.
- **The “showbiz” elements of a vocal studio audience: flashing or dramatic lighting, dramatic, canned music; applause.**²⁰

19. The Reality genre is a more recent form, but has been popular for more than 20 years. It is, perhaps, the most common and talked-about genre on television today. Like Game Shows, Reality shows incorporate most or all of several distinguishing characteristics:

- **“Real” events.** The primary organizing characteristic of a Reality show is that it features and is centered on footage of “real” events²¹ occurring that were not scripted by the show's writers. Rather than snippets of controlled or contrived conversation on a studio set such as in a newscast, Talk, or Game Show, the viewer watches what appears to be unfettered human drama - “reality” - unfolding, at length. Even if the show's producers manipulate the environment or activities, they do not control the

of participants...be intelligent...keep the audience informed...have contagious enthusiasm...take anything in his stride...be extremely fair and courteous to those on his program.” Maxine Fabe describes the emcee's all-powerful presence and role similarly in *TV Game Shows*, for example, “Everything that happens in front of the camera is the host's responsibility.” Fabe, p. 20.

17 <http://www.museum.tv/eotvsection.php?entrycode=quizandgame>.

18 Fiske, p. 272.

19 Eastman and Ferguson, p. 174.

20 Fiske, p. 277, Holbrook, pp. 64, 69, and Fabe, pp. 18, 65.

21 <http://www.museum.tv/eotvsection.php?entrycode=realityprogr>.

reactions of the participants (*i.e.*, the cast). As a result, in the TV industry, Reality is often referred to as “Unscripted Drama” programming.

- **Cinema-verite.** The camera captures the scenes as they happen,²² unobtrusively, like a fly-on-the-wall. Via this cinema verite-style camera, the intention is to capture and show the participants acting naturally (real) with each other, as if the camera was not present, as opposed to a staged scene, interview, or game. The viewer is observing the participants like fish in a fishbowl.
- **Production requirements that are comparatively complex and time-consuming.**
The cameras and microphones must shadow the cast participants from location to location. The post-production editing to piece together the show is extensive since the show is created in the edit room using a fraction of the footage shot, most often out of sequence. Similar to the one hour action programs described above by the *Encyclopedia of Television*, the significant production and post-production processes required by these Reality shows are like those for “small movies.”
- **The use of locations (exterior and/or interior; usually more than one) that appear to be real-world, as opposed to studio sets.**

20. In contrast to Game Shows, if the Reality show employs a host at all, he or she is not the always-present, all-powerful, in-control schoolmaster totally; instead, the host usually lets the participants have significant control over the course of events. Unlike a Game Show, neither competition nor a studio audience is essential to the genre, and, as a result, some Reality shows feature competition and audiences while most do not.²³ Finally, Reality shows generally exhibit

²² <http://electronics.howstuffworks.com/reality-tv.htm>.

²³ Over the last 10 or so years, a succession of hit shows which embody the attributes delineated above for Reality genre shows and also feature competition among contestants, such as *Survivor*, *American Idol*, and *The Voice*,

a season-long continuity in the cast of participants (which, in the case of Reality shows that do involve competition, may decrease episode by episode).

21. As the above list makes clear, Reality and Game Shows differ substantially in these specific programming characteristics. As a result, almost all of the programs on GSN and WE tv were found to be readily genre-identifiable because they were overwhelmingly dominated by the attributes of one genre or another of the total of 11 genres identified.

22. An authentic identification of the programming genres aired on GSN and WE tv²⁴ cannot consist of the consideration of a handful of self-selected shows without regard to how long ago they were run. Nor can it ignore the amount of airtime a network devotes to such shows if they are put forth as accurately representing the network's programming. A legitimate analysis must examine the full menu of content offered by each channel throughout all of its airtime for an appropriate and comprehensive period of time. As a result, my review includes, but is not limited to, the consideration and categorization by genre of every program aired on each of the networks during common sample weeks of 2009, 2010 and 2011.²⁵ In order to ensure that each season of each of the years would be captured, I chose one week per quarter

has brought enormous attention to this type of Reality show. As a result of the public awareness and industry focus, it is sometimes labeled with its own moniker, "Reality-Competition", perhaps indicative of a Reality sub-genre or even a closely-related, but separate, genre. Although common on some other networks, throughout 2009, 2010, and 2011, GSN and WE tv each carried minuscule amounts of Reality-Competition programming. In fact, during the 12 representative sample weeks, of the 47 titles GSN aired, just one (*Dog Eat Dog*) was a Reality-Competition program, filling less than 1% of the network's airtime. Similarly, of WE tv's 106 titles, only two (*Iced With Sylvia Weinstock* and *Momma's Boys*) were Reality-Competition shows, also accounting for less than 1% of its airtime. I placed all three shows in the Reality genre category.

24 After examining the 2010 daily programming schedules for Wedding Central and reviewing the descriptions of the content, date, and origin of every show that aired during the year, I determined that it was extremely similar to WE tv in programming and audience during its 22 month existence. Its mix of genres was dominated by Reality and, like WE tv, also included Movies, Documentary, Fashion and Shopping, and Food and Drink. In fact, approximately 75% of the programs that aired on Wedding Central in 2010 also aired on WE tv. Almost all of the programs were directly concerned with or somehow encompassed a wedding. As a result of this substantial similarity to WE tv and the fact that Wedding Central was discontinued on July 1, 2011, I will not focus on the network any further in this declaration.

25 The list of genres used is virtually identical to that used in my declaration and report submitted in the above-referenced WealthTV FCC proceeding. My list was not challenged by the Commission.

using a random number generator, for a total of 12 sample weeks.²⁶ This resulted in a large sample of programming, composed of 47 of GSN's 2009 – 2011 total of 66 unique program titles (different series and specials) and 106 of WE tv's total of 260 unique titles. As a result, I am confident that the programming examined is closely representative of that aired by each network as a whole throughout 2009, 2010, and 2011.²⁷

23. The schedules for each network (with shows color-coded by genre), a list of every program aired, and program descriptions and genre identifications can be found in CV Exh. 230 (Egan Ex. 2A through 2D).

24. After identifying the genre of each program aired in the sample weeks, I calculated the percentage of total broadcast hours each genre represented on the networks. It showed stark distinctions between GSN and WE tv's programming genres and the amount of airtime given to them by each network.

- GSN devoted 98% of its broadcast hours to its defining genres of Game Shows and poker Gaming while WE tv aired that content in *less than* 1% of its hours.
- WE tv devoted 46% of its broadcast hours to the Reality genre while GSN aired that content in *less than* 1% of its hours.

26 The 12 common weeks are those beginning: 1/19/09, 6/29/09, 9/07/09, 11/02/09, 2/1/10, 5/17/10, 9/6/10, 12/13/10, 3/21/11, 5/23/11, 7/11/11, and 10/17/11.

27 To perform this analysis, I obtained the total broadcast day schedules for WE tv and GSN for every day of 2009, 2010 and 2011. The GSN schedules and the 2009 WE tv schedules were purchased from Tribune Media Services, one of the leading providers of TV listings to MVPDs and newspapers throughout the United States. I requested and was given the 2010 and 2011 WE tv schedules and the show descriptions for all three years and also accessed those at WEtv.com. The GSN show descriptions were obtained online at GSN.com as well as numerous other web sites. Web sites used for this and other purposes also include TV.com, IMDB.com, reelz.com, aoltv.com, thetvdb.com, youtube.com, thefutoncritic.com, offthefence.com, xfinitytv.comcast.net, Zap2it.com, iTunes, Wikipedia.com, and tvtango.com. As explained in detail above in section III, METHODOLOGY, I also identified, requested of WE tv's counsel, and reviewed dozens of DVDs of episodes of certain WE tv and GSN programs, and recorded and reviewed the week of November 8, 2011's primetime programming for each of GSN and WE tv and several hours of WE tv in 2013. In addition, full episodes and clips of many GSN and WE tv shows were viewed online at some of the web sites mentioned above.

REDACTED – FOR PUBLIC INSPECTION

- WE tv devoted 93% of its broadcast hours to its top five genres of Reality, Comedy, Drama, Movie, and News while GSN aired that content in *less than 3%* of its hours.

<u>GENRE HOURS & RANKINGS (2009 - 2011)</u>				
<u>Genre</u>	<u>GSN</u>		<u>WE tv</u>	
	<u>Rank</u>	<u>% of Hrs.</u>	<u>Rank</u>	<u>% of Hrs.</u>
Game Show	1	91%	9	<1%
Gaming	2	7%		0
Comedy	3	2%	2	18%
Reality	4	<1%	1	46%
Drama:		0	3	12%
SciFi/Fantasy				
Movie		0	4	10%
News		0	5	7%
Documentary		0	6	4%
Talk		0	7	2%
Fashion & Shopping		0	8	<1%
Food & Drink		0	10	<1%
<u>Total</u>		<u>100%</u>		<u>100%</u>
% of Hours excludes paid programming hours which were virtually identical for the two networks				

25. The difference in breadth and diversity of programming on the two networks is also clearly differentiating. GSN aired a total of four genres during the representative weeks of 2009, 2010, and 2011 while WE tv ran two and one-half times as many different genres for a total of 10. It is significant that *all* of GSN's hours of Reality programming consisted of just two short-lived programs. One was *Dog Eat Dog*, a Reality-Competition series that seems to have been taken off the air after only five months of airing in 2009. The other, *Carnie Wilson:*

Unstapled, after receiving terrible reviews,²⁸ was cancelled within two months of its premiere in January 2010, seemingly after producing a total of nine episodes.²⁹ Those episodes were then run as repeats through June of 2010 when it was taken off the air for good, leaving GSN with programming from only three genres during the balance of the sample weeks in 2010 and all of 2011.

26. This significant difference in programming breadth and diversity is also evident in the list of program titles that ran in the sample weeks over the three years.³⁰ While GSN ran a total of only 47 unique titles (series and specials), WE tv aired more than two times that for a total of 106 unique titles (series, Movies, and specials). These totals are in sync with a review of *all* 156 weeks of the full three years of 2009 – 2011 which determined that GSN aired only 66 unique titles while WE tv ran 260. Significantly, during the sample weeks, fully 37% of GSN's programming airtime consisted of episodes of just *three* well-known Game Shows: *Deal Or No Deal*, *Lingo*, and *Family Feud*.

27. Because cable networks typically describe their programming on their websites, I also reviewed the websites of GSN and WE tv to learn if and how they identified their genres. Their self-descriptions support the findings of my genre analysis.

GSN - In the "About" GSN tab, GSN.com defines GSN's programming as TV Game Shows, game programming, and online Gaming.

"GSN is a multimedia entertainment company that offers original and classic *game programming* via its 73 million subscriber television network and online games sites. GSNs cross-platform content puts winning within reach for viewers

28 See, for example, the [REDACTED]

29 See <http://www.imdb.com/title/tt1533007/>.

30 See CV Exh. 230 (Egan Ex. 2A).

and participants, whether through GSNs popular *TV game shows*, gsn.com's free casual games or its WorldWinner competitive cash tournaments.”³¹

No mention is made of a “relationship and female-oriented reality” genre or any of the other similar compound names opined to be Reality genre programming on GSN by the Complaint. In fact, no mention is made of Reality at all, or any genres other than Game Shows and Gaming. Notably, GSN has employed this same self-description on its YouTube television channel.³²

WE tv – Unlike GSN.com, WE tv.com does not name the TV network's genres. However, in the “Who WE Are” tab, WE tv.com says, “WE tv is family 2.0. It's the *real*, familiar stories that make us say ‘that could be me!’”³³ and lists some of the shows on the network. Notably, all of the shows it chooses to highlight as indicative of the network are widely recognized as Reality shows, and none are Game Shows:

“Original programming includes:

- *Braxton Family Values*: A candid look at the relationship between singer/songwriter Toni Braxton, her mom, and her four sisters - who are all aspiring singers - and captures the drama surrounding their conflicts, both personal and professional, combined with lots of family love and laughter.

- *Downsized*: Follows the Bruce family, a nine-member blended family trying to survive difficult economic times.

- *Joan & Melissa: Joan Knows Best?*: Melissa Rivers' world is rocked when her mother Joan sets out to switch coasts, change her lifestyle and infiltrate Melissa's home.

- *My Fair Wedding with David Tutera*: Viewers follow celebrity wedding planner, David Tutera, as he transforms the misguided wedding visions of enthusiastic brides into platinum style affairs.”³⁴

31 <http://tv.gsn.com/about.jsp> (emphasis added; accessed June 19, 2012).

32 <http://www.youtube.com/user/GSNVideos>. The description appeared as of my December 2011 visits but was removed sometime thereafter prior to June 7, 2012.

33 <http://www.wetv.com/who-we-are> (accessed June 19, 2012; emphasis added).

34 <http://www.wetv.com/who-we-are>. Notably, all of these WE tv shows are labeled as “Reality Genre” by the online TV database IMDbTV as well as iTunes. <http://www.imdb.com/tv/> and <http://www.apple.com/itunes/> (accessed 7-6-12).

28. I also note that in her January 2013 deposition, WE tv's President and General Manager, Kimberly Martin, explains [REDACTED]

29. Each spring, the cable networks attend "upfront" meetings in New York during which they share their programming, branding, and sales plans for the next TV season with the press and advertising community. In addition to making one or more presentations, each network typically shows a "sizzle reel" (a short video) that tells the story of what they have been doing and how they plan to evolve in the coming TV season. Because the sizzle reels can be very useful in identifying the programming genres aired on a network, I obtained three for each of GSN and WE tv.³⁶

30. Not surprisingly, each of the sizzle reels for the networks confirms my findings of the genres they air. GSN's videos are [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

35 [REDACTED]

36 GSN's sizzle reels are at CV Exh. 225 (GSN 2009 Company Meeting Programming Sizzle Reel), CV Exh. 224 (GSN 2010 Upfront Sizzle Reel), CV Exh. 222 (GSN 2011 Upfront Sizzle Reel) ("GSN sizzle reels"). WE tv's sizzle reels are at CV Exh. 220 (WE tv 2009 Upfront Sizzle Reel), CV Exh. 219 (WE tv 2010 Upfront Sizzle Reel), and CV Exh. 218 (WE tv 2011 Upfront Sizzle Reel) ("WE tv sizzle reels").

2. The 2012 public [REDACTED] statements of GSN's senior executives affirm that it has been a Game Show network and not a network airing programming labeled by the Complaint as "relationship and female-oriented reality." The executives have stated bluntly that they hope to add a new genre of "real-life" shows in the future.

31. Throughout GSN's Complaint and the declarations and reports of its experts, the programming on GSN is repeatedly claimed to be in several variations of the Reality genre, alternately calling it "relationship and female-oriented reality," "female-oriented reality outside of the relationship genre," "reality-based," and "real-life talk/relationship."³⁷ Like the findings of my genre analysis, recent public statements by GSN's senior executives belie those genre characterizations, affirming my conclusions that GSN has been a Game Show network from birth through this point in time.

32. During the 2012-13 TV season upfront meetings, GSN announced with great fanfare that it intended to significantly "transform" its programming in the upcoming season. Reporting on the meetings in its article, *GSN Plans to Add Reality TV to Its Game Show Roster*,³⁸ the New York Times said, "The GSN cable channel plans to expand into Reality television for the 2012-13 season, the channel's programming and advertising executives said at an upfront breakfast on Wednesday. In moving beyond its roster of traditional Game Shows, 'we'll drop the four walls of the studios,' said John Zaccario, executive vice president for ad sales at GSN." The Times goes on to quote David Goldhill, President and Chief Executive Officer of GSN, as saying "GSN 'had been seen more as a museum of game shows than a contemporary television network'"; that the addition of Reality programming is an expansion, "'to broaden the appeal'"; and that the new programming is a "'transformation'."

37 Complaint, ¶¶ 18, 36; Brooks 2012 Decl., ¶¶ 7 – 8; Singer Report, ¶¶ 4, 31; *id.*, Exhibit 1, Declaration of David Goldhill, dated October 7, 2011, ¶ 7.

38 <http://mediadecoder.blogs.nytimes.com/2012/03/21/gsn-plans-to-add-reality-tv-to-its-game-show-roster/>.

33. GSN's upfronts press release explained that, in the next season, the network would begin to air for the first time what it called "real-life games", making it clear that GSN believed that the new shows will be a break with the past and a new format for the network. "In addition to the network's popular studio-based game shows, GSN is broadening its programming and brand promise to incorporate real-life games."³⁹ Likewise, in its August 9, 2012 press release announcing the 2013 premiere of one such "real-life game show", GSN bluntly explained its opinion that these shows will add a new genre to a network consisting of Game Shows, "This announcement is part of GSN's overall development strategy to broaden into other programming genres in addition to the network's popular studio-based game shows."⁴⁰

34. Even GSN's private communications throughout the years have made it perfectly clear that it is a Game Show and Gaming genre network. Just two of the many examples make the point.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]⁴¹

35. GSN's Vice President of Research and Planning, Michael Michell, [REDACTED]

[REDACTED] EVP Programming, Amy Introcaso-Davis, on [REDACTED]

[REDACTED]

39 <http://corp.gsn.com/press/releases/gsn-unveils-its-new-programming-and-development-slate-during-network-upfront-event-ne>.

40 <http://corp.gsn.com/press/releases/gsn-greenlights-new-original-series-family-trade>.

41 CV Exh. 50 at 3 (GSN Overview – Comcast).

B. GSN And WE tv Do Not Have Similar Target Programming.

36. While the broadcast television networks generally program and brand themselves for broad and diverse audiences comprising viewers of many different interests and demographics, most cable networks employ a far more targeted narrowcast strategy. Using an umbrella-like, organizing theme as its guide (often referred to as a “brand promise” or a “brand positioning”), a cable network develops its target programming, that is, *the programming content it seeks to acquire, produce, and display in order to distinguish itself and attract its target audience*. For example, ESPN has called itself the “The Worldwide Leader in Sports” for many years, and it acts as such, targeting the rights to high profile, very popular sporting events. Another, Discovery Communications’s Planet Green, was an eco-friendly themed network airing programming centered on issues and events affecting our environment. Recently, Planet Green was rebranded as Destination America with a new, Americana target programming theme organizing its programming and branding. According to its senior vice president of content strategy “What makes us unique is that we’re only about America - we can go deeper and examine America’s roots, character, and really get into the true grit and tenacity that defines who we are.”⁴³ To date, Destination America has acquired and produced a lineup of U.S.-specific travel, food, history, and lifestyle programming.

37. To further examine whether or not GSN and WE tv were similar in programming, I identified and compared their target programming themes as well as the competition between

⁴² [REDACTED]

⁴³ R. Thomas Umstead, “Discovery Unfurls Destination America”, Multichannel News, May 28, 2012, p. 6.

them, if any, for the rights to air specific programs and talent that embody those themes. Regular and on-going competition therein might possibly be an indicator of similarity in target programming. And, while there are many unrelated reasons why two cable networks might cooperate on promotion, I also evaluated the frequency and nature of past cooperative efforts between GSN and WE tv because the Complaint claimed these resulted from programming similarity.

38. The target programming theme of a network is articulated through the *subject matters* and *look and feel* of its programming, interstitials, promotional materials, and website. In addition to reviewing these, I also gathered and reviewed third party descriptions of each network as well as those of the networks' own presentations that I was able to obtain.

1. **The subject matters of GSN and WE tv programs differ dramatically. WE tv typically displays content for and about women in their family-centered ages with an emphasis on weddings, their families, and their challenges, all told from a distinctly female point of view. On the other hand, GSN airs programming centered on contests and the games are the primary subject. It is designed to attract those adults, both men and women, seeking, as GSN's programming chief explained, "the excitement and fun of winning."**

39. GSN launched in the mid-1990s as Game Show Network, airing classic Game Shows almost entirely from syndicators' libraries. In 2004, it shortened its name to GSN, added a tagline of "The Network for Games", and, while keeping its traditional Game Shows on air during the day, it broadened its nighttime programming by including some original poker shows and Reality-Competition programming.⁴⁴ However, later in 2005, amid numerous executive personnel changes, GSN moved its primary focus back to studio-based Game Shows although

⁴⁴ <http://www.multichannel.com/content/reinvention-channel/111135>.

the poker shows remained. Since that time, GSN has added numerous original Game Shows as well as several play-at-home interactive games.⁴⁵

40. WE tv launched in 1997 as Romance Classics, televising romance Movies and series wholly targeted to women. In 2001, it re-branded as WE: Women's Entertainment, shortening to WE tv in 2006. After 2001, while remaining targeted to women, the network dramatically reduced the amount of Movie programming in favor of off-network Drama, Comedy, and News series as well as acquired and originally-produced Reality programs, such as its first break-out hit original, *Bridezillas*, which premiered in 2004.

41. In reviewing the three years of programs that aired on WE tv and GSN via the representative sample weeks of 2009, 2010 and 2011, I found that each of the networks was consistent in the subject matter it acquired and developed. I also found that, other than in the case of the short-lived GSN Reality series, *Carnie Wilson: Unstapled*, there was practically no overlap between the subject matters of the 106 different programs (show series, specials, and Movies) that aired on WE tv and the 47 different programs that ran on GSN.

42. The large majority of the programs on WE tv speak of and to subject matters generally of particular interest to women in the age range most typically associated with marriage and family, 18 to 54 (which also happens to be a particularly desirable age range for advertisers). In its 2010-11 TV season stage presentation to the annual "upfront" gathering of national media reporters, advertisers, and executives, WE tv showed a slide communicating its target programming with the heading [REDACTED]

[REDACTED]

45 GSN aired poker shows each week throughout 2009, 2010, and 2011; however, a review of the GSN schedule on its web site on September 27, 2012 indicated that it is no longer running such shows on the television network although they can be streamed on the GSN website.

[REDACTED]

[REDACTED] The page is included at CV Exh. 230 (Egan Ex. 3). Of course, a corollary to this female-centric programming menu is that most of these programs would generally be of far less interest to the average adult male.

43. In large part, WE tv's original programming consists of shows revealing real women (not actors) experiencing the emotional stresses and joys accompanying weddings (Sunday has been branded "Wedding Sunday"⁴⁶); families (*e.g.*, sisters, mothers and daughters); female entrepreneurship; best-female-friends; and couples. In recent years, several of these series have followed female celebrities and entrepreneurs, seemingly day to day, caught up in the throes of such real-life experiences. These subjects and some of WE tv's Reality show celebrities can be seen in the excerpts of its [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

44. WE tv's perspective is, without question, female. [REDACTED]

[REDACTED]

[REDACTED] (See CV Exh. 230 (Egan Ex. 5)). WE tv also offers off-network Dramas and Sitcoms focused on strong female protagonists, programs involving fashion and shopping,

⁴⁶ Through 2011, 100% of WE tv's Sunday airtime was devoted to wedding shows, while in 2012, Sunday night's programming is all wedding-centric.

and the type of Movie sometimes referred to as “chick flicks.” Notably, as will be discussed in section V.E.1.c.iv, less than three percent of all of the programs on WE tv feature competition.

45. In contrast, regardless of topic, virtually all of the programs on GSN are built around a contest, and the game is the primary (more often than not, the only) concern. In *TV Culture*, Fiske explains that *Game Shows are primarily games and produce particularly active, participatory viewers.*⁴⁷ In *TV Game Show*, Fabe wrote, “a game show has to actively involve the viewer.”⁴⁸ And, in *Games in the Global Village: A 50-Nation Study of Entertainment Television*, Anne Cooper-Chen quotes a contest coordinator for the show *Scrabble* in explanation for why Game Shows are so compelling “people like to... play along – they like to feel smart.”⁴⁹ In short, *the primary determining audience characteristic for virtually all of GSN’s programming – regardless of whether it’s Hollywood Squares, Baggage, Love Triangle, The Newlywed Game, Jeopardy, Deal Or No Deal, Who Wants To Be A Millionaire, or the poker Gaming shows – is not one’s gender, but rather, one’s interest in contests and Game Shows.*

46. GSN’s presentations and internal studies over the relevant years have spoken regularly of this target programming theme. Just a few examples serve to illustrate the consistent branding and programming theme communicated in virtually all of these.

47. GSN’s presentation to [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

47 Fiske, p. 265.

48 Fabe, p. xiv.

49 Anne Cooper-Chen, *Games in the Global Village: A 50-Nation Study of Entertainment Television* (Bowling Green State University Popular Press, 1994), p. 17.

50 [REDACTED].

48.

[REDACTED]

49.

[REDACTED]

50. GSN's Executive Vice President of Programming, Amy Introcaso-Davis, has preached this message more than once. In a GSN press release she described the "core attributes" of GSN's brand promise as these three components: "the excitement and fun of winning, entertainment for the whole family, and viewer engagement."⁵³ And commenting on the recent acquisition of the Game Show *MINUTE TO WIN IT*, she detailed the important attributes of a GSN target program, "Fun, entertaining and competitive -- this game show brings all the elements that resonate with our core audience." Todd Whiting, GSN's Senior Vice President, Cable & New Media Distribution, further underlined the essence of the network's

51 [REDACTED]

52 [REDACTED]

53 <http://corp.gsn.com/press/releases/gsn-unveils-its-new-programming-and-development-slate-during-network-upfront-event-ne>.

programming theme, saying in the same release, “GSN, with its emphasis on interactive games, is a perfect home for *MINUTE TO WIN IT*.”⁵⁴

51. Just a couple of examples from the sample weeks underscore the contrast between GSN and WE tv with regard to the role gender plays for each in determining its target programming.

52. WE tv’s *Cinematherapy* would be totally out-of-place on GSN. It consists of a host in what appears to be her apartment who combines Talk and a Movie. As WE tv.com describes it, “You watch a movie on WE tv and our cinematherapist Jackie Tranchida helps people like you let it all out! Make an appointment to watch Jackie work — the session’s on WE!” The Movies chosen are those targeted to women with such subjects as romance, emotional family relationships, sisterhood among female best friends, girls coming of age, mothers and their children, and female empowerment. Some of the many such films aired in 2009 through 2011 were: *Pretty in Pink*, *The Bridges of Madison County*, *Bridget Jones’s Diary*, *Dirty Dancing*, *Divine Secrets of the Ya-Ya Sisterhood*, *Ever After: A Cinderella Story*, *Ghost*, *Never Been Kissed*, and *Steel Magnolias*.

53. In contrast are the poker shows *Doubles Poker Championship*, *High Stakes Poker*, *World Poker Tour*, and *Pokerstars Caribbean Adventure* on GSN. TV poker is traditionally aimed at a male demographic target. For example, according to GSN’s internal report,

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

54 <http://corp.gsn.com/press/releases/gsn-acquires-network-rights-minute-win-it>.

██████████ Throughout the sample weeks of 2009, 2010, and part of 2011, GSN devoted the majority of primetime for one or more nights every week to poker Gaming shows. WE tv has never aired a poker show since it is entirely incompatible with its female target audience.

54. An abundance of publicly and privately available third party resources confirm that the target programs of WE tv concern women in their family-centered ages, and that GSN's target programs continue to be competition-focused Game Shows. (Of course, GSN also aired poker Gaming programs in the relevant years, 2009 – 2011.) The web site of the National Cable & Telecommunications Association states, "WE tv (www.wetv.com) is the women's network that showcases an unfiltered view of modern family life.", and, "GSN is a multimedia entertainment company that offers original and classic game programming and competitive entertainment."⁵⁶ SNL Kagan, a leading media business analyst and publisher, describes WE tv as "dedicated to helping women connect to one another and to the world around them.", and GSN as "a game content provider distributing competition programming through its cable network and its casual and skill-based online portal, GSN.com."⁵⁷ (See also Time Warner Cable Media, describing GSN: "gives game lovers the opportunity to win cash and prizes", and "offers original and classic game programming and competition entertainment"; and describing WE tv: "WE tv "gives viewers compelling perspectives on women's lives" and "knows that family is at the center of women's lives").⁵⁸

55. The two networks also communicate their subject matters on their web sites, and the difference in themes is obvious at a glance. The WE tv site immediately makes clear that this

55 See GSN_CVC_00003002-3003.

56 See National Cable & Telecommunications Association, Cable Networks, at <http://www.ncta.com/Organizations.aspx?type=orgtyp2&contentId=2907>.

57 See SNL Kagan, "Network Profiles", in *Economics of Basic Cable Networks*(2011), pp. 327, 624.

58 Time Warner Cable Media at <http://www.twcmedia.com/TWC/PB/CustomerSubLanding.aspx?id=4720>; Cable Advertising Bureau at <http://www.thecab.tv/>.

content is aimed at females, 18 – 54, via its images of dynamic women entrepreneurs and celebrities, weddings, and families. Its color palette is dominated by pastels. WE tv's tagline "life as WE know it" heads the page and its brand promise is stated as, "Every kind of family. All kinds of drama. That's life as we know it on WE tv network."⁵⁹

56. On the other hand, the GSN site is reminiscent of a casino video terminal.⁶⁰ It is primarily deep blue in color, very busy, dominated by changing invitations to play games and win prizes such as to "Cash Competition", "Play 300 Spins" or "Ways To Win Today", all of which is accompanied initially by loud, video gaming-type instrumental music. In contrast to WE tv, its self-description does not mention women, relationships, or topics of special interest to many women, but instead, says it offers "original and classic game programming via its 73 million subscriber television network." In the "Shows" tab, a rotation of graphic slides plays at the top, including one with what was described as the network's tagline motto by Multichannel News,⁶¹ "THE WORLD NEEDS MORE WINNERS." For ease of comparison, I captured a screen shot of each site as of October 26, 2011 and included them together on one page at CV Exh. 230 (Egan Ex. 6).⁶²

57. In short, the primary subject matters of the programming on the two networks are extremely dissimilar, one centered on contests and winners, while the other is focused on the personal life stories of women and families. As a WE tv programming executive explained in an

59 See <http://www.wetv.com/> (accessed October 26, 2011).

60 See <http://www.gsn.com/> (accessed Oct. 26, 2011).

61 See <http://www.multichannel.com/marketing/gsn-adds-incentive-affiliates-jackpots/138476>.

62 This screen shot comparison was captured in October, 2011 and originally included as an exhibit to my December 12, 2011 declaration (*Game Show Network, LLC v. Cablevision Systems Corporation*, Answer of Cablevision Systems Corp. (filed Dec. 12, 2011), File No. CSR-8529-P ("Cablevision Answer"), Declaration of Michael Egan, attached as Exhibit A ("Egan 2011 Decl."). Although as of October 6, 2012, each web site remained very similar overall to its 2011 status, including in subject matter, content, graphics, functionality, and look and feel, as is customary to keep entertainment sites fresh and to reflect programming changes, each site has been revised somewhat.

email [REDACTED]

[REDACTED]⁶³

2. **The programming content on WE tv and GSN looks and feels very different, resulting in dissimilar network personalities and brands. WE tv's appearance and point of view are traditionally female and personal. In general, GSN's visual and audio qualities are gender neutral and "showbiz"-y. Like a traditional Game Show, GSN often "flashes and buzzes."**⁶⁴

58. Look and feel is the visual and audio language that, hand in hand with programming content, creates a network's personality. It is integral to its target programming theme and network brand, indicative of its target audience, and can be a distinguishing element of a network's programming presentation to its viewer. Look and feel is a deliberate creation by producers and networks that employs the elements of production and scheduling, including, music; graphics; interstitial features and promos between programs; the age, gender, ethnicity, dress, styling, and demeanor of on-air personalities; and the pace of transitions between show segments.

59. In its article titled, "Cable networks brand themselves through the look and feel of programs," the Pittsburgh Post-Gazette quotes Bonnie Hammer, chairman of cable entertainment and cable studios for NBCUniversal, describing USA's consistent visual look and the resulting upbeat feel among its viewers, "'The way we look at it is psychographic and psychological blue skies and visible blue sky. The palettes of our shows are bright ... We take everything from a more aspirational point of view. And it's physical, from the colors we use to how much we go outside during the day versus indoor and at night.'"⁶⁵ This year, USA is moving into the Reality

63 Se [REDACTED]
[REDACTED] at CV-GSN 0073704.

64 Fabe, p. 66.

65 <http://www.post-gazette.com/stories/ae/tv-radio/cable-networks-brand-themselves-through-the-look-and-feel-of-programs-307387/>.

genre for the first time with the help of that successful look and feel. Its co-president, Chris McCumber, explained the strategy, “The reality we’re doing ... where we (are) giving people a new lease on life or giving them that dream job or dream career... the tone that we’re taking is very aspirational and blue sky, which is in keeping with what we have on the rest of the network.”⁶⁶

60. To compare the on-air look and feel of GSN and WE tv, I viewed a great deal of GSN and WE tv airtime and recorded programming. The details are presented above in section III, METHODOLOGY. In summary, I viewed all or parts of multiple episodes of 53 different series, specials, and Movies, totaling 55.5 hours of recorded full-length WE tv and GSN programs and on-air interstitials and another 120 minutes of show clips in addition to three GSN sizzle reels and seven WE tv sizzle reels.

61. Because GSN has been almost entirely old and new Game Shows, its on-air look can best be described as “Traditional Game Show.” As Fabe wrote in *TV Game Shows*, “Game Shows look and sound different from any other kind of television program.”⁶⁷ With few exceptions, GSN consistently delivers that “different” look and sound created by the typical Game Show visual and audio elements described by Fiske, Holbrook, and Fabe,⁶⁸ including:

- an all-powerful emcee;
- music that often turns dramatic during tense moments as the game approaches its climax;
- theatrical or flashy lighting;
- fixed-place cameras showing a single studio set; and

66 R. Thomas Umstead, Multichannel News, “USA Co-Chiefs: No Risk, No Reward”, May 28, 2012, www.multichannel.com/article/485150-USA_Co_Chiefs_No_Risk_No_Reward.php.

67 Fabe, p. 65.

68 See Fiske, pp. 267, 272, 277; Holbrook, pp. 64 – 69; Fabe, pp. 18, 65.

- a boisterous audience whose oohs, ahs, and applause let us know its opinions of the contestants' answers and choices.

62. The show hosts are overwhelmingly male (both in the programs I watched as well as during the twelve sample weeks: 39 men and 11 women) while the Game Show players are roughly equally divided in gender and the poker shows players are dominated by males.

63. Typically, one GSN show is separated from another only by commercials and promos for other Game Shows on the network, although, occasionally, a promo runs for a block of Game Shows labeled “Flashback Fridays” or “Million Dollar Mondays” (old games shows running back to back). I did not see an attempt by the network to create a GSN personality separate from the Game Shows or a thematic umbrella to connect the shows to each other or to any specific demographic group in its audience. In short, GSN lets the Game Shows speak for themselves. GSN alluded to its own, long-standing look and feel in its 2012-13 upfronts press release describing how it hopes to add shows in the future “whose overall look, feel, and sound design will be innovative and a departure from those typically associated with television game shows.”⁶⁹

64. In sharp contrast, WE tv presents a single-minded theme and focus on 18 – 54 year old women, their relationships, and their families via the shows themselves and the promos in between them. It is articulated through the subject matter; the age, look, and gender of the show “casts”; the graphic styles and colors; the music; and the taglines. As explained by WE tv’s President and General Manager, Kim Martin, [REDACTED]

[REDACTED] The shows overwhelmingly feature women, including, to name just a few of the many, pop music diva Toni Braxton, her many sisters and mother; Los

69 <http://corp.gsn.com/press/releases/gsn-unveils-its-new-programming-and-development-slate-during-network-upfront-event-ne>. [REDACTED]

Angeles haute couture hair stylist Kim Kimble; the brides of the numerous wedding-related Reality shows; Joan & Melissa Rivers; the three super-powered sisters fighting evil in *Charmed*; and Jennifer Love-Hewitt as a newlywed who helps the recently-deceased in *Ghost Whisperer*.

65. Unlike GSN, WE tv ties these shows to each other and to its brand promise via a theme of WE tv's creation, articulated by its promotional spots between shows. Without stating it in words, one branding spot I saw cleverly made it clear in just 30 seconds: *This network tells the personal story of the emotional ups and downs of family life, directly from the female point of view*. While upbeat music played, it proceeded as follows:

- WE tv logo and tagline "life as WE know it" in red;
- *Braxton Family Values* show clip of the Braxton sisters and mother laughing;
- "Every Kind of FAMILY" in red;
- *Joan & Melissa* show clip with Joan & Melissa Rivers hugging and a clip of *My Fair Wedding* lead David Tuttera hugging a bride;
- "All Kinds of DRAMA" in red;
- Clip of Joan & Melissa Rivers arguing, a clip of a bride from *Bridezillas* crying, and a clip of the Braxton family members fighting;
- "Every Kind of FAMILY" and then "All Kinds of DRAMA" in red;
- Clip of two girls hugging and a clip of Joan & Melissa toasting as Joan says "To family!"; and
- WE tv logo and tagline "life as WE know it" in red.

66. In summary, the two networks, to varying degrees, use their visual and audio languages to create very different personalities that, together with the subject matters of their shows, create and define extremely different target programming themes.

3. An evaluation of the record of competition and cooperation between GSN and WE tv in the areas of programming, talent, and promotion reveals that there is no special relationship between the networks.

67. I requested specific and detailed information from Cablevision regarding cooperation and/or competition with GSN in programming, on-air talent, and promotion. After reviewing the responses and examining the schedules of the networks, I conclude that the claims made in the Complaint are seriously overblown, and the events described appear to be common practice in television production, program development, and network promotion. I found no evidence of any special correlation or relationship, friendly or competitive, between GSN and WE tv.

68. I looked for program crossovers and cooperative programming efforts between the networks, but I found none. I cross-referenced *all* program titles (excluding paid programming) on the TV schedules of both GSN (which aired 66 unique series or specials) and WE tv (which ran 260 unique series, specials, or films) during 2009, 2010, and 2011 and found no programs that were aired on both networks over the course of the three years. Furthermore, in response to my inquiry, WE tv confirmed that [REDACTED]

[REDACTED]

69. With regard to competition to acquire programming, I was unable to find evidence of any between these two networks during those years. Dr. Singer names seven programs that were pitched to both WE tv and GSN during 2011 and 2012.⁷¹ According to the “WE tv Development Overview, 2009-2011,” WE tv received [REDACTED]

[REDACTED]⁷² Presumably, GSN received a comparable number. Since production companies and their agents make their livings selling programs, my understanding is that they regularly

⁷¹ Singer Report, ¶¶ 7, 50.

⁷² CV Exh. 72 at 12 (WE tv Development Overview 2009-2011).

pitch multiple networks, at times with the same programs.⁷³ The limitation to only seven duplicate pitches over the course of nearly two years and perhaps thousands of show pitches received by the two networks over that period, appears to be convincing evidence that most show producers do not consider the programming sought by GSN and WE tv to be similar. Moreover, it appears that WE tv did *not* compete for *any* of the seven shows Dr. Singer identifies, instead declining to pursue any one of them.⁷⁴

70. With regard to talent, I found no evidence of a desire within WE tv's management to share talent with GSN. Nor did I find a pattern of on-going activity between the networks during 2009, 2010, and 2011 (the years I researched). Instead, there were a few, isolated occurrences of promotional appearances by WE tv show cast members on GSN, [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

71. GSN identified one of these. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

72. In response to my request, WE tv identified three other such instances not mentioned by GSN in its Complaint. [REDACTED]

[REDACTED]

73 See Cablevision Answer, Exhibit I, Declaration of Deidre O'Hearn, Vice President, Development and Talent for WE tv, dated 12/8/11, ("O'Hearn 2011 Decl."), ¶ 4.

74 See CV-GSN 0004582 and O'Hearn 2011 Decl.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

73. These four events are examples of what is typically called a “barter deal” in the business. As can be seen in the chart in CV Exh. 230 (Egan Ex. 7), since 2008, WE tv has engaged in [REDACTED]. Many of these differ radically from WE tv in audience and/or programming, including [REDACTED]

[REDACTED]

[REDACTED] Likewise, GSN has entered into or attempted to enter into [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

74. Tammy Pescatelli is a stand up comedian who, according to GSN, [REDACTED]

[REDACTED]. In 2011, Ms. Pescatelli appeared on WE tv in one, short-lived Reality program. She also seems to be an ongoing presence across the television landscape, appearing on many different networks and programs. Recent bios on her website have listed appearances on NBC’s *Last Comic Standing 2*, *Last Comic Standing: The Best of the*

75 See [REDACTED] at CV-GSN 0016202.

76 Simmons OneView Summer 2011 12-month survey, 7/26/10-9/2/11, Comcast Spotlight, <http://www.comcastspotlight.com/network/spiketv>.

77 Deposition of Dale Hopkins, January 24, 2013, pp. 128-140 and deposition exhibit Hopkins 9A.

*Best and The Tonight Show with Jay Leno; The Talk on CBS; Nickelodeon's NICK Mom's Night Out; Dennis Miller; PAX's Balderdash; National Lampoon's Funny Money; Comedy Central's The World Stands Up! and Comedy Central Presents: Tammy Pescatelli; TBS's Evening at the Laugh Factory and Last Call with Carson Daly; VH1: E!: G4: A&E: Country Music Television and TV Land: and the Jerry Lewis Telethon, among others.*⁷⁸ The fact that GSN [REDACTED] [REDACTED] who appeared so frequently on many different cable and broadcast networks, including WE tv, cannot plausibly be considered evidence of a pattern of competition for talent.

75. In summary, since the programming on the two networks conforms to totally different organizing themes as evidenced in their divergent subject matters and look and feel, and because I found no evidence of on-going competition for programming or talent or any special promotional relationship between the networks, I conclude that GSN and WE tv are very dissimilar in the factor of target programming.

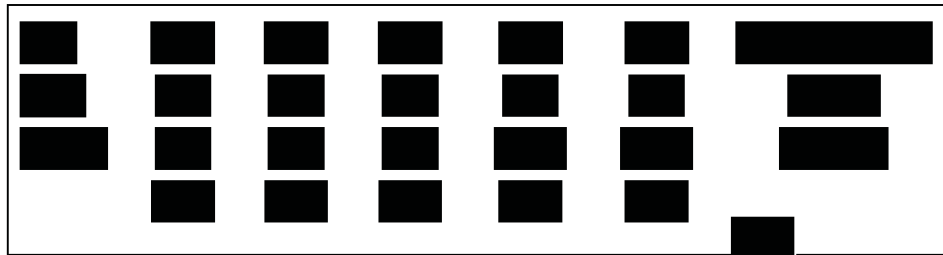
C. GSN And WE tv Are Not Similar In Programming Expenditure.

76. The amount of money spent on programming by a cable network can be a distinguishing factor because it can provide insight to an industry observer on the valuations of the network content made by both buyers (MVPDs) and sellers (producers and rights holders) in the marketplace. According to SNL Kagan, WE tv spent [REDACTED]
[REDACTED]
[REDACTED] Moreover, while GSN's annual investment in programming [REDACTED]
[REDACTED]

⁷⁸ <http://www.pescatelli.com/bio/> (accessed 11/30/2011 and 7/19/12).

GSN – WE TV

PROGRAMMING EXPENSES COMPARISON (million \$)⁷⁹



1. WE tv's [REDACTED] programming expenditures provide the financial resources for it to produce standout original programming and to acquire [REDACTED] highly-recognized, off-network programming, both containing the subscriber-related attributes MVPDS typically value most.

77. In my experience, when making carriage decisions, cable operators place primary importance on a network's perceived contribution to the attributes of subscriber satisfaction, acquisition, and retention, the drivers of the month-to-month video subscriber revenues constituting *almost the entirety* of a cable company's video revenue. Several elements are important to their analysis of the network's contribution, most notably, its license fee and its programming.

78. When focusing specifically on the programming, especially if the network's carriage is on a broadly-penetrated tier, a major MVPD generally evaluates the network's potential impact on subscriber satisfaction, acquisition, and retention based on the network's ability to deliver its own, standalone, identifiable value that is additive to the rest of the lineup ("added value"). For example, in a service level lineup of 75 or more channels, on a cable system with hundreds of viewing options, simply delivering a modest rating does not make a network stand out among the "white noise" generated by the many other choices. As a result, a

⁷⁹ SNL Kagan, *TV Networks Summary – Basic Cable Networks by Programming Expenses (\$000)* available at http://www.snl.com/interactivex/tv_NetworksSummary.aspx (subscription required) (last visited Nov. 13, 2012).

major MVPD typically will place a higher value on a cable network that separates itself from the crowd via such programming characteristics as the popularity of its brand, talent, and genre, its uniqueness, originality, exclusivity, breadth, and quality; the network's promotional commitments to exploiting these to the benefit of the MVPD; its reach within the subscriber base; and a meaningful amount of customer demand.

79. However, the programming expenditure usually required to generate this MVPD-desired added value is significant. The *production* and airing of original and exclusive programming is one tactic often employed to break through the clutter of viewing options and create "buzz". As WE tv's Senior Vice President of Scheduling and Acquisitions put it,

[REDACTED]

[REDACTED]

[REDACTED] The *acquisition* of rights to air content that is already popular as a result of its airings on broadcast networks (or in movie theaters) is another tactic used. Typically, *producing* original programming meeting these high standards is relatively expensive. Likewise, *acquiring* the rights to air such programs is unusually costly since the more popular a program has already been and can be expected to continue to be with the viewing public, the more its seller – its producer or licensor - will demand from a network in the programming sales marketplace for the right to display it.

80. During 2009, 2010, and 2011, WE tv and GSN each produced a significant amount of original programming, [REDACTED]

[REDACTED]

[REDACTED]

80 Deposition of Elizabeth Doree, pp. 73-74.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

81. Although GSN has invested in original programming, it is my opinion that its originals have not attracted the consistent level of attention among the public and the trade press needed to deliver the added value characteristics prized by cable operators and described above.⁸² On the other hand, it appears that at least two of WE tv's original series in production during those years have created a significant public buzz, *Bridezillas* and *Braxton Family Values*. While the former series is a long running hit, *Braxton Family Values* has generated both high ratings and significant social media chatter since its early 2011 premiere. Its January 26, 2012 airing ranked WE tv as the number three ad-supported cable network in primetime among women 18-34, number five among women 18-49, and the program ranked number one among African-American women 18-49 and 25-54. Its social media conversation was unusually loud, placing it in the top five overall TV rankings in the social media universe.⁸³ Later in 2012,

[REDACTED]

[REDACTED]

81

[REDACTED] he detail of costs for each network is available at CV Exh. 230 (Egan Ex. 8A).

82 Apparently, Cablevision agreed with my assessment. See Cablevision Answer, Exhibit D, Declaration of Thomas Montemagno, Senior Vice President, Programming Acquisition, Cablevision Systems Corporation, dated 12/9/11, ¶¶ 24, 26, 41, 45, 46, in which he voiced similar conclusions about GSN's lack of value to his cable system.

83 http://www.amcnetworks.com/release_release_press.jsp?nodeid=6473#.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

82. Nonetheless, the far bigger difference in program expenditures between the two network's spending appears to be in the acquired programming component. According to GSN, it spent [REDACTED] on programming acquisitions in 2011. In contrast, WE tv spent [REDACTED] to license its acquired series and Movies.⁸⁵

83. For the most part, the WE tv series were marquee, off-broadcast-network, Dramas and Sitcoms, starring well-known talent, including *Ghost Whisperer* with Jennifer Love Hewitt, and *Frazier* with Kelsey Grammer and David Hyde Pierce. And WE tv's Movies included the hits *You've Got Mail*, *While You Were Sleeping*, and *The Pelican Brief*. In contrast, like GSN's original programming, most of its acquired Game Shows did not bring a high level of public popularity equivalent to that of the WE tv acquisitions, in my opinion.⁸⁶ The dramatic difference in licensing costs for each network's acquired programming component suggests that the sellers in the programming sales marketplace also placed a far greater value on the WE tv acquired programming than on the GSN acquired programming.

84 <http://www.multichannel.com/mcnbc-events/we-tv-greenlights-docu-series-sanya-richards-ross-and-aaron-ross/141827>

85 These are the expenses each network amortized (expensed) for acquired programs in 2011. The detail for each network is available at CV Exh. 230 (Egan Ex. 8B).

86 For example, during 2011, only five GSN Game Show acquisitions, *1 vs. 100*, *Are You Smarter Than a 5th Grader?*, *Deal Or No Deal*, *Million Dollar Password*, and *Who Wants To Be A Millionaire*, brought with them a moderate or high level of public awareness from several seasons of recent broadcast network airings, while seven off-network, acquired series (*The Golden Girls*, *Frazier*, *Ghost Whisperer*, *Charmed*, *48 Hours*, *20/20*, and *Girlfriends*) and several dozen "pre-sold", Hollywood theatrical Movies that aired on WE tv were accompanied by that level of public popularity.

84. Although GSN's inexpensive acquired programming may not deliver the value attributes desired by some cable operator buyers, [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

- [REDACTED]
- [REDACTED]

85. It appears that, by limiting its spending almost exclusively to Game Shows and the occasional Gaming show, through 2011, GSN was able to keep its programming expenditures extraordinarily low compared to both the cable network industry as a whole and to those networks with a similar number of subscribers.

87 See [REDACTED] at GSN_CVC_00014853.

88 "Graden GSN Presentation", June 22, 2011, attached to email dated June 22, 2011 at 8:47 PM from Kelly Goode, Senior Vice President, Programming, GSN to the network's programming and production executives and later forwarded by Jennifer Freeman, Executive Director of Programming, GSN on July 8, 2011 at 5:10:43 PM. GSN_CVC_00013487.

2. **Examined by multiple measures, WE tv invests** [REDACTED]

86. The table below contrasts the two networks' 2011 programming expenses to industry benchmarks and to each other. Even though its subscriber count makes it one of the largest of the nearly 200 cable networks tracked and analyzed by SNL Kagan, GSN's programming expenditures appear to be [REDACTED]

[REDACTED].

87. Although GSN was [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

The results in

2010 were nearly identical to those of 2011.

PROGRAMMING EXPENSE COMPARISON

TO INDUSTRY AVERAGES 2011⁸⁹

[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]

89 SNL Kagan, *TV Networks Summary – Basic Cable Networks by Programming Expenses (\$000)(2008-2015)*, and *TV Networks Summary – Basic Cable Networks by Subscribers (M)(2008-2015)*, both available at http://www.snl.com/interactivex/tv_NetworksSummary.aspx, and *GSN – Industry Benchmarks Report (2008-2015)* and *WE tv – Industry Benchmarks Report (2008-2015)*, both available at <http://www.snl.com/InteractiveX/BriefingBook/TvNetwork/IndustryBenchmarksReport.aspx?ID=164> (subscription required) (both last visited Nov. 13, 2012).

- [REDACTED]

3. Compared to their broadly-penetrated cable network peers, WE tv

[REDACTED]

88. In addition to comparing the networks against industry-wide averages, it is also enlightening to examine them within their subscriber-count peer group of cable networks, all members of which also enjoyed carriage on well-penetrated service levels such as expanded and digital basic. The table below shows the average of the 2011 programming expenditures of all of the cable networks within [REDACTED]

[REDACTED] subscribers. The [REDACTED]

[REDACTED]. Due to the uniquely high cost of sports rights, I excluded the six sports-oriented networks [REDACTED]

[REDACTED]. The detailed listing of the 24 networks and their programming expenses can be found at CV Exh. 230 (Egan Ex. 9).

89. It is clear that GSN's annual investment in programming [REDACTED]

[REDACTED]

[REDACTED] Conversely, WE tv's programming expenditure was [REDACTED]

[REDACTED]

**COMPARISON OF GSN AND WE TV TO THEIR
SUBSCRIBER-SIZE PEER GROUP
BY 2011 PROGRAMMING EXPENSES⁹⁰**

90. The vast difference between GSN and WE tv in annual programming investment is meaningful and distinguishing. [REDACTED]

_____ enabling it to produce numerous high-profile original and exclusive series and specials and to acquire multiple, marquee series and Movies, presumably in an effort to create and sustain significant value for its affiliates, its advertisers, and its ownership.

D. Conclusions Regarding Programming Content Similarity.

91. As explained at the start of my testimony, experience informs me that the analysis of whether or not these two video programming networks are/were similar in programming content should examine the factors of genre, target programming, and programming expenditure. Having done the extensive empirical research necessary to reach informed findings, I conclude as follows.

90 See SNL Kagan, *TV Networks Summary – Basic Cable Networks by Subscribers (2008-2015)*, and *Basic Cable Networks by Programming Expenses (2008-2015)*, available at http://www.snl.com/interactivex/tv_NetworksSummary.aspx (subscription required) (both last visited Nov. 13, 2012).

(a) **The two networks are not at all alike in genre.** WE tv is Reality, Drama, Comedy, Movie, and News for 93% of its broadcast day while GSN is Game Shows and poker Gaming shows for 98% of its broadcast day.

Notably, the oft-repeated claim in the Complaint and Reply that each of GSN and WE tv feature Reality programming, making the networks similar in genre as a result, is both entirely inaccurate and a serious mischaracterization of GSN. In truth, from 2009 through 2011, Reality was an insignificant element of GSN's schedule. GSN aired only two Reality genre programs during the sample weeks, representing less than one percent of its programming airtime while WE tv aired 36 Reality titles which accounted for 46% of its airtime. In fact, a careful review of *every* show aired by GSN during *all* of the 156 weeks within the three years of 2009 – 2011 determined that GSN aired only *three* shows that meet the criteria of a Reality genre show, and those shows together accounted for *far less than 1%* of GSN's programming airtime.⁹¹

In addition, WE tv delivers a much greater number and diversity of both genres and programs, totaling two and one-half times as many genres and three times as many different program titles as were aired on GSN during this three year period.⁹²

(b) As will be detailed in the next section, the characterizations in the Complaint and by Mr. Brooks that each of the networks airs programming featuring competition, implying similarity in this respect, is a grossly misleading characterization

91 During the sample weeks of the three years, GSN aired two Reality shows, *Carnie Wilson: Unstapled* and *Dog Eat Dog*. During the balance of the weeks of the three years, GSN aired one other show with a qualifying degree of the Reality genre elements, a one-time special, *Baggage First Dates*, which followed two contestants from the Game Show *Baggage* on a date. These three programs aired for a combined total of 102 hours during the 21,900 hours of the three year period which equates to less than 1% of the network's total programming airtime.

92 Throughout *all* 156 weeks of 2009 – 2011, GSN aired 66 unique program titles (series and specials) while WE tv aired a total of 260.

of WE tv.⁹³ From 2009 through 2011, *less than three percent* of WE tv's different programs and *less than one percent* of its airtime consisted of shows, regardless of genre, with competition during the sample weeks. On the other hand, 96% of GSN's shows and *more than 97%* of its airtime consisted of programming from the Game Show and Gaming genres, wholly centered on competition.

(c) **The two networks are not at all alike in target programming.** GSN and WE tv are each tightly-focused on different organizing themes around which they acquire and develop their programming, resulting in shows with dissimilar subject matters and look and feel, and consequently, distinct target programming. WE tv airs content for and about women in their family-centered years of 18 – 54 with, as AMC Networks spelled out in its April 2011 presentation to lenders, [REDACTED] [REDACTED] See CV Exh. 230 (Egan Ex. 10). In contrast, GSN delivers on its promise to delight those adults, both men and women, seeking to be part of a Game Show or poker Gaming competition. As its President and CEO, David Goldhill, explained to the New York Times, "Nobody watches a game show without playing along. It's almost an involuntary action."⁹⁴ As a result, perhaps it should not be surprising that the networks seem to have so little opportunity and interest in sharing programming or talent, and that I was unable to identify any incidents of competition between them for target programming or talent.

(d) **The networks are not alike in programming expenditures.** WE tv's annual programming investments dwarf those of GSN by a factor of [REDACTED] [REDACTED], an insight into the relative valuations of their programming

93 Complaint, ¶ 36; Brooks 2012 Decl., ¶ 9.

94 <http://www.nytimes.com/2010/08/31/business/media/31adco.html?pagewanted=all>.

content by the buyers and sellers in the marketplace. Moreover, compared to their cable network peers, WE tv invests [REDACTED]

For these reasons, I conclude that GSN and WE tv are very dissimilar in programming.

E. Flaws In GSN's Discussions Of Programming Similarity.

1. Regarding Genre.

a. Neither GSN nor Mr. Brooks presents a genre analysis.

92. The *Second Report* identifies genre as one of the factors to be analyzed in determining similarity in programming content. Initially, I undertook an extensive genre analysis that included both a qualitative identification of certain genres and a quantification of the hours and percentages of airtime dedicated to every genre carried by each of GSN and WE tv, enabling me to provide an accurate description of the full composition of both networks' programming over the course of two years (2010 and 2011). I presented my findings earlier in this proceeding in my 2011 declaration filed in this proceeding. For this testimony, I expanded the scope of the quantitative research to include an additional year (2009) of programming on each network, pursued additional qualitative research, and have presented the detail and conclusions regarding the three full years in section V.A.

93. GSN has taken a different approach. Earlier in this proceeding, while criticizing the length, depth, and conclusions of my genre analysis, Mr. Brooks stated that a genre analysis "serves little purpose."⁹⁵ Perhaps realizing now that his dismissal flies in the face of the *Second Report*, Mr. Brooks now softens the expression of his disregard, saying that genre analysis "is

⁹⁵ Brooks Reply Decl., ¶ 11.

not as persuasive as audience measurement data.”⁹⁶ That position might be logical and appropriate if the parties were in agreement regarding the similarity of genre question. In other words, if after reading my genre analysis, Mr. Brooks and GSN accepted my conclusions of genre dissimilarity, thereby resolving the status of that programming factor, there would be no need for Mr. Brooks or GSN to undertake the genre research. However, they reject my analysis and conclusion, but fail to provide an analysis of their own. Nonetheless, they somehow still manage to come to a conclusion of genre similarity between GSN and WE tv.

94. Moreover, as a result of their decision to forgo both a qualitative and a quantitative analysis of the programming genres on the two networks, GSN and Mr. Brooks fail to identify (much less take into account) many of the 11 television genres aired on either GSN or WE tv. Instead, they focus almost entirely on just two, Game Shows and Reality. This undermines any pretense of a bona fide consideration of the genre factor, especially with regard to WE tv which delivers programming in 10 different genres.⁹⁷ As a result, they lack meaningful consideration of 80% of the programming genres aired by WE tv which fill *more than 50%* of its programming airtime!

b. The data presented by GSN and Mr. Brooks is grossly insufficient for the purpose of determining whether or not the networks are similar in programming genre.

95. Excluding paid programming (infomercials), GSN aired 66 unique programs (different series and specials) from 2009 through 2011. In making their claims that GSN programming “overlaps” and is therefore similar in genres aired to WE tv, Mr. Brooks and GSN point to a combined total of *only nine* of these GSN 66 programs. During this same three year

⁹⁶ Brooks 2012 Decl., ¶ 83.

⁹⁷ See section V. A. 1., above.

period, WE tv aired 260 unique programs. Of those, GSN and Mr. Brooks name a total of *just eleven* of these WE tv programs in making their case of similarity in programming genre.⁹⁸

96. Moreover, the GSN and WE tv shows were not chosen by a scientific sampling method to obtain representative “test tube” samples of programs that would accurately resemble the compositions of the 66 and 260 title menus, but rather, they were carefully self-selected, seemingly to achieve a pre-determined result. Due to this deficiency in quantity and the bias in their selection, neither group of programs should be assumed to legitimately represent the networks’ programming. And, any comparisons made using these collections cannot amount to more than opinions based on anecdotal evidence.

98 Mr. Brooks and GSN name just four GSN Game Shows - *Baggage*, *The Newlywed Game*, *Love Triangle*, *Family Feud*- and its one short-lived Reality series, *Carnie Wilson: Unstapled* as similar in some way to WE tv Reality shows. In reaching the total of nine I liberally credit them with above, I also included four Game Shows that Mr. Brooks proposed not as similar to WE tv shows, but as examples of the overlap of the Reality and Game Show genres. His basis for doing so is a Wikipedia entry he quotes as saying “many people” group them under *both* the Reality TV umbrella *and* the traditional Game Show one. The “many people” do not include Mr. Brooks who, in 2007, had categorized all four of these shows *only* as “Quiz” (Game) shows in his published catalog, *The Complete Directory to Prime Time Network and Cable TV Shows, 1946-Present* (Tim Brooks and Earle Marsh, *The Complete Directory to Prime Time Network and Cable TV Shows, 1946-Present*, (New York: Ballantine Books, 9thEd. 2007)). These four Game Shows are: *Deal Or No Deal*, *Weakest Link*, *Dog Eat Dog*, and *Who Want To Be A Millionaire?* See Brooks 2012 Decl., ¶ 81. The 11 WE tv shows named are all Reality series - *Bridezillas*; *Rich Bride, Poor Bride*; *I Do Over*; *My Fair Wedding*; *The Cupcake Girls*; *Downsized*, and *Braxton Family Values*, plus four more Reality shows Mr. Brooks named not as similar to GSN programs, but simply as examples of Reality and Game Show genre overlap, *Adoption Diaries*; *Amazing Wedding Cakes*; *Amsale Girls*; and *Staten Island Cakes*

- c. **Many of the characterizations of GSN and WE tv programming made by GSN and its expert are not substantiated by facts and are erroneous.**
 - i. **The claims that GSN “primarily airs women-oriented” programming and that Game Shows have a special appeal to women are unsubstantiated. Moreover, the expansive “women-oriented” label does not address whether or not GSN’s programming is similar to WE tv’s programming which is narrowly targeted to women 18 – 49 and 25 – 54.**

97. In lieu of a credible genre analysis, GSN and Mr. Brooks repeatedly characterize GSN’s programming as “women’s entertainment”, having a “predominant focus on women,” “women-oriented,” and “female-oriented,” even stating that GSN “*primarily* airs women-oriented programming”⁹⁹ (emphasis added). However, they present neither a qualitative analysis of the programs themselves to substantiate the claim that they are specifically designed to appeal to women (*i.e.*, *targeted* to women), nor a scientific accounting of the hours such self-described “women-oriented” programming is aired to prove that it constitutes a significant portion, much less the *majority*, of the network’s programming.

98. Instead, Mr. Brooks and GSN just repeat – often - their simplistic claim that Game Shows have always and continue to exhibit a special appeal to women.¹⁰⁰ Mr. Brooks attempts to substantiate this opinion with a quote from a 2005 industry publication, *TV Dimensions 2005* (New York: Media Dynamics, p. 281), stating that the adult audience for daytime TV Game Shows averages 67% female and for syndicated early fringe Game Shows, 60% female.¹⁰¹ The clear implication is that these female skews for Game Shows are

99 Complaint, ¶¶ 15, 18; Reply, I. C.; Brooks 2012 Decl., ¶¶ 7, 8, 71.

100 Brooks 2012 Decl., ¶¶ 71, 74, 83; Brooks 2011 Decl., III.1.c; Reply, I. A. 2., and I. C.

101 Brooks 2012 Decl., ¶ 83 and n. 79.

extraordinary and represent the evidence needed to confirm a preference among females for Game Shows above other types of programming.

99. In fact, these Game Show skews are not out of the ordinary at all, and Mr. Brooks's source contradicts his implication. In the same table containing the Game Show skew numbers quoted, *TV Dimensions* also provides the skews for the four other types of programming nationally aired. It clearly displays that *Game Shows are less female-skewed than the majority of the other program types*, ranking fourth of five in daytime and tied for third of five in early fringe. With a 67% skew in daytime, Game Shows trail Serials at 76%, Sitcoms at 73%, and Talk shows at 71%. In the early fringe period (just prior to primetime), the Game Show skew of 60% trails Sitcoms's 63% and that of Magazine shows (61%), tying it with local News for third place of the total of five program types. *TV Dimensions* illuminates the truth of the matter: *daytime and fringe TV audiences overall have been skewed to women historically* and the Game Show audience portion is no exception. The fact that Game Shows aired in the daytime and fringe – when women strongly dominate all TV viewing - draw more women than men viewers does not indicate that Game Show programming has a special appeal to women nor that its content is designed to appeal to women.¹⁰²

¹⁰² To bolster his notion that Game Shows hold a special appeal for women, Mr. Brooks includes one line snippets from three other publications in note 66. Although Mr. Brooks chooses to isolate these tiny clips to serve his purpose, the full texts and contexts of all three of his sources actually corroborate my discussion above that daytime audiences skew female for *multiple* genres of programming, not just Game Shows. These are Edd Applegate, *Journalism in the United States: Concepts and Issues* (Scarecrow Press, 2011), p. 90; Morris B. Holbrook, *Daytime Television Game Shows and the Celebration of Merchandise: The Price Is Right* (Bowling Green State University Popular Press, 1993), pp. 43, 82 – 84; and Anne Cooper-Chenn, p. 92. Notably, all three of his sources also present additional insights into the age compositions of overall television, daytime, and Game Show audiences, some of which I will discuss in the audience section of this testimony, *i.e.*, that they skew to senior citizen women in particular. Quoting a Nielsen research report, Applegate writes, "Women 55+ viewed the most [TV] among all demographics." Quoting another expert's work, Holbrook says "older women are much more likely to be interested in the daytime quiz and game programs." And "their data show peak ratings for daytime game shows among women over 50 years of age." Holbrook, p. 84. The last, Anne Cooper-Chenn, writes "the 55+ female viewer remains the mainstay of game shows' audience." Cooper-Chenn, p. 71.

100. In short, GSN fails to provide the evidence (qualitative and quantitative) to substantiate its claims that Game Shows appeal especially to women and that GSN's schedule of Games Shows and poker Gaming programs in 2009, 2010, and 2011 was targeted to women.

101. Ultimately, GSN's unproven assertion that it primarily airs "women-oriented" programming fails to address the crux of the question of whether or not GSN's programming is similar to that of WE tv. It is undisputed that WE tv primarily airs programming purposefully targeted to women *between the ages of 18 – 49 and 25 – 54*. The paramount question is: does GSN do so as well? GSN's unsubstantiated characterization of its programming as being primarily "women" oriented, that is, targeted to *all women of all ages*, flies far wide of that target.

ii. The claim that much of the programming GSN airs is "relationship-themed" and similar to WE tv's family and romantic relationship-themed programming is unsupported by facts and is predicated instead on the invention of a sweeping, and non-distinguishing, new genre.

102. In an effort to equate GSN's wide variety of Game Show programming with WE tv's dominant genre of Reality and its consistent subject matter of family and relationships, the Complaint, GSN's President and CEO, and GSN's experts each embrace a newly-fabricated "relationship" genre, asserting that the programming of both networks is defined by this creation. Rather than substantiate this new relationship genre with a factual qualitative analysis of third party criticism and objective, empirical evidence identifying how these programs meet its defining criteria, GSN and its experts offer a handful of vague and ill-defined opinions. As in the case of their "female-oriented" characterization, they again fail to provide any comprehensive and statistically legitimate quantification of the hours such programming aired or the percentage of airtime it constituted for either network during the relevant years. Instead, they

identify as members of this new genre a combined total of only *four* of the 66 shows that have aired on GSN, however briefly¹⁰³, during the three years between 2009 and 2011- *Baggage*, *Love Triangle*, *The Newlywed Game*, and *Family Feud* - labeling them, alternately, as “relationship and female-oriented reality”, “relationship-themed”, “relationship-based”, and “real-life talk/relationship.”¹⁰⁴

103. These multiple, new GSN labels are not recognized as a television genre by any authoritative source of television criticism or analysis with which I am familiar (nor do GSN or its experts cite any such source in support of their argument). Moreover, the “real-life talk/relationship” version cobbles together three long-standing, well-known, and quite distinct TV genres, Game Show, Reality, and Talk show.

104. “Relationships” is a vague subject matter, not a genre. It is, perhaps, the most common subject matter on television, being regularly a part of nearly all TV genres, such as Drama, Soap Opera, Sitcom, sci-fi, Movies, and Talk, in addition to Reality and Game Show. This GSN-proposed standard for substantial similarity – all networks airing *any* programs having anything to do with romantic or family relationship - is so vague and encompassing that it fails to be a distinct and distinguishing measure. I estimate there have been hundreds of television shows and Movies centered on that eternally popular and thoroughly routine topic that have aired on dozens of cable networks and many more broadcast TV stations.

105. For example, a tiny sample of the plethora of such shows, encompassing multiple genres, includes current/recent hits from (1) *broadcast television*, such as the hit comedies, *Modern Family*, *Big Bang Theory*, *How I Met Your Mother*, *Two and A Half Men*, and *Family Guy*; the Dramas, *Parenthood*, *Desperate Housewives*, and *Grey’s Anatomy*; the Reality shows,

103 *Love Triangle* seems to have run for five months in 2011 and then been taken off the air.

104 Complaint, ¶¶ 18, 36; Brooks 2012 Decl., ¶¶ 7 – 8; Singer Report, ¶¶ 4 – 5, 29-31; Goldhill Decl., ¶ 7.

The Bachelor and *The Bachelorette*; (2) *basic cable*, such as *The Real World*, *Jersey Shore*, *Real Housewives of New Jersey* (and all the other versions of the show from: New Jersey, Atlanta, New York, Beverly Hills, Orange County, Miami...), *Rock of Love*, *Flavor of Love*, *Kate Plus 8* and; (3) *premium cable*, such as HBO's *Girls*, *Big Love* and *Sex and the City*, and Showtime's *The L Word*. Of course, there are countless more such shows that air and have aired on various networks and broadcast stations as reruns such as *Friends*, *Cheers*, *Everybody Loves Raymond*, *The Dating Game*, *All In The Family*, *The Bill Cosby Show*, and many, many others.

106. While easily recognized as inconsequential from a macro perspective, the proposed new “relationship” genre looks untenable from up close. For example, one of the GSN shows Mr. Brooks presents as a “relationship” game is *Family Feud* which “emphasizes families working together on challenges.” He then states that many of WE tv’s Reality shows “touch upon the same themes as GSN’s ‘relationship’ games – dating, romance, and family dynamics.” One such WE tv Reality show he names is *Downsized* which is also centered on a family’s dynamics and its challenges.¹⁰⁵ Since both shows have *something* to do with family relationships, they qualify as members of the new genre, and Mr. Brooks thereby equates *Family Feud* with *Downsized*. In truth, the shows have nothing in common other than this meaningless “family dynamics and challenges,” *i.e.*, “relationship,” description.

107. *Family Feud* is a nearly 30 year-old, prototypical Game Show, 30 minutes long, typically stripped Monday through Friday, and most famously hosted by the wry and amusing, “Kissing Bandit”, Richard Dawson. GSN’s web site describes *Family Feud*:

Survey SAYS...! This icon of game show history pits family against family in a race to guess top survey responses to topical questions and control the game

¹⁰⁵ Brooks 2012 Decl., ¶¶ 7, 9.

*board. The final Fast Money round requires two family members to step up and play for their clan to win thousands of dollars in cash prizes!*¹⁰⁶

108. WE tv's *Downsized*, which premiered as recently as 2010, is a 60 minute, original, weekly Reality series following the (melo)dramatic personal lives of a family attempting to cope with its economic woes, including bankruptcy, over the course of multiple television seasons. WE tv's web site describes it:

*Flat broke with two homes in foreclosure, a collapsed contracting business and a daily struggle to make rent, Todd and Laura Bruce are doing everything possible to keep their family of nine above the poverty line. From dumpster diving to food stamps, tune in to "Downsized", an original WE tv series, to watch this modern day "Brady Bunch" navigate the very real stresses of life in modern America.*¹⁰⁷

109. Obviously, the Game Show *Family Feud* is not at all similar to the Reality Show *Downsized*. GSN's newly-fabricated "relationship" label is not a genre and fails to qualify as a significant, much less distinguishing, programming factor.

iii. The claim that the three GSN Game Shows named are similar to the three WE tv Reality shows named disregards genre analysis, the third party evidence, and even GSN's own public characterizations.

110. In making its claim of a "relationship" genre, GSN alleges that its three programs named, *The Newlywed Game*, *Love Triangle*, and *Baggage*, are especially similar to three Reality shows on WE tv, *Bridezillas*, *Rich Bride*, *Poor Bride*, and *I Do Over*.¹⁰⁸ To analyze the claim, I watched the available clips and/or episodes of the shows cited and researched their descriptions on GSN.com and WE tv.com as well as other television web sites.

111. In the table below, I categorized the programs by the most defining attributes of the game and Reality genres that I delineated above in section V. A. 1. Obviously, there is *no*

¹⁰⁶ <http://www.gsn.com/shows/familyfeud/index.html>.

¹⁰⁷ <http://www.wetv.com/shows/downsized/about>.

¹⁰⁸ Complaint, ¶ 18.

commonality of genre between the GSN and WE tv shows. Each of the GSN shows is, without question, a Game Show in the tradition of the genre, and each of the WE tv shows is a bona fide Reality show.

	<u>Yes = Game Show</u>	<u>No = Reality Show</u>
<u>Scripted</u>	<i>The Newlywed Game</i> <i>Love Triangle</i> <i>Baggage</i>	<i>Bridezillas</i> <i>Rich Bride, Poor Bride</i> <i>I Do Over</i>
<u>Simple, Formalized Production Techniques; Little Post-Production</u>	<i>The Newlywed Game</i> <i>Love Triangle</i> <i>Baggage</i>	<i>Bridezillas</i> <i>Rich Bride, Poor Bride</i> <i>I Do Over</i>
<u>Emcee/Host; Omni- Present and In Charge</u>	<i>The Newlywed Game</i> <i>Love Triangle</i> <i>Baggage</i>	<i>Bridezillas</i> <i>Rich Bride, Poor Bride</i> <i>I Do Over</i>
<u>Single Studio Set</u>	<i>The Newlywed Game</i> <i>Love Triangle</i> <i>Baggage</i>	<i>Bridezillas</i> <i>Rich Bride, Poor Bride</i> <i>I Do Over</i>
<u>“Showbiz” Elements: - Studio Audience - Dramatic Music - Flashing/Dramatic Lighting</u>	<i>The Newlywed Game</i> <i>Love Triangle</i> <i>Baggage</i>	<i>Bridezillas</i> <i>Rich Bride, Poor Bride</i> <i>I Do Over</i>

112. Furthermore, while *all* three GSN programs are centered on the essential Game Show characteristic of a contest among the show’s participants (“contestants”), *none* of the WE tv programs involves competition at all.

113. Notably, GSN itself labeled each of these shows a Game Show in its press release of February 16, 2011, saying “As part of GSN’s original spring programming line-up, the network will showcase a new “love block” of relationship-oriented *game show* programming every weeknight, featuring LOVE TRIANGLE, THE NEWLYWED GAME, and BAGGAGE, hosted by Jerry Springer.” The press release went on, “Kelly Goode, GSN’s SVP of

Programming said, ‘BAGGAGE and THE NEWLYWED GAME are our two highest rated series, and pairing them with LOVE TRIANGLE – another relationship-oriented *game show* – will form a great, original ‘love block.’”¹⁰⁹

114. Third-party confirmations of my genre classifications are plentiful. Just two examples illustrate the overwhelming consensus. Tribune Media Services (“TMS”), distributor of entertainment content reaching over 100 million consumers worldwide every day and a leading provider of TV guide listings to the U.S. multichannel television industry, classifies all three GSN programs as Game Shows and all three WE tv programs as Reality shows. And the web site IMDB.com, one of the most popular and comprehensive on line television databases, likewise categorizes each of the GSN programs as a Game Show and each of the WE tv programs as a Reality show.

iv. GSN does not attempt to (and cannot) support its egregiously-inaccurate implication that each network airs similar amounts of “competition shows”.

115. In addition to its “relationship and female-oriented reality” label, GSN also calls these same three GSN shows “competition programming” and “Reality and Game Shows.”¹¹⁰ It then attempts to equate these shows to WE tv shows by saying, “Likewise, WE tv airs a number of competition and reality shows” and names two of the three WE tv shows again (*Rich Bride*, *Poor Bride* and *I Do Over*) along with one additional show, *My Fair Wedding*.¹¹¹ In truth, *not one* of the three WE tv shows named involves competition. Mr. Brooks makes a related and erroneous statement that also misrepresents WE tv’s programming and is nearly as unsupportable as GSN’s when, in referring to three programs that aired between 2006 and 2008, he says, “WE

¹⁰⁹ <http://corp.gsn.com/press/releases/gsn-announces-new-premiere-dates-drew-careys-improv-a-ganza-and-love-triangle-with-we> (emphasis added).

¹¹⁰ Complaint, ¶ 36.

¹¹¹ Complaint, ¶ 36.

tv has also aired some competition shows similar to those on GSN, including *Weight Loss Challenge*, *Style By Jury*, and *Skating's Next Star*.”¹¹² The first two shows named did not involve competition. They were makeover programs. Only the last of the three was a Reality-Competition program.

116. The implications that the networks air similar amounts of programming featuring competition, indicating similarity in this respect, are seriously inaccurate and misleading characterizations of WE tv. From 2009 through 2011, in the representative sample weeks, WE tv aired only *three* programs featuring competition among its 106 different programs, accounting for *less than three percent* of its titles and *less than one percent* of its programming airtime. On the other hand, *45 of 47* GSN programs featured competition, constituting *96%* of its titles and *97%* of its airtime.¹¹³

d. The denial by Mr. Brooks and GSN of the existence of the Reality genre is not supported by the facts and is contrary to Mr. Brooks's own published work, the overwhelming preponderance of third party evidence, the public statements of GSN's executives, and even GSN's own claims in this proceeding.

117. Mr. Brooks and GSN attempt to obscure the obvious genre difference between the networks by making the extraordinary claim that Reality is not a distinct genre of television programming. They state that Reality programming is a recent and poorly-defined characterization that overlaps multiple other genres, most notably game and dating shows, and, as a result, Reality is not a distinct genre of programming.¹¹⁴ These opinions are not supported

112 Brooks 2012 Decl., ¶ 9.

113 The three WE tv shows that *did* feature competition were a Game Show, *America's Cutest Puppies*; a one hour Reality special, *Iced with Sylvia Weinstock*; and the Reality series, *Momma's Boys*. The only two GSN shows that *did not* feature competition were the Comedy *Drew Carey's Improv-A-Ganza* and the Reality show *Carnie Wilson: Unstapled*

114 Brooks 2012 Decl., ¶ 76; Reply I. C., pp. 29 - 31.

by facts, and are in part inaccurate and in another part overblown and irrelevant; consequently, their conclusion is erroneous.

118. Reality is not a recently created programming form. The first Reality show on American TV is often considered to be *An American Family* which aired on PBS in 1973, nearly 40 years ago. Just a few of the broadcast network Reality shows that were very popular between the late '70s and the early '90s were the hit series, *Real People* (1979 – 1984 on NBC), *Rescue 911* (1989 – 96 on CBS), and *American Detective* (1991 – 1993 on ABC).¹¹⁵ Two other shows that also premiered more than 20 years ago continue to be considered seminal to the Reality genre today, *Cops* in 1989 and MTV's *Real World* in 1992. All of these long preceded the incredible phenomenon of *Survivor* which began in 2000. While Mr. Brooks implies that *Survivor* and the year 2000 were the birth of the Reality genre, the fact is that 2000 was the kick-off of its offspring, which years later became known as the *Reality-Competition* sub-genre. In fact, by 2001, the Reality genre had already become so robustly populated, well-understood, and immensely popular that the television industry created a distinct Emmy award to recognize excellence in the Reality genre, followed by a separate Emmy for Reality-Competition in 2003.

119. Notably, GSN and Mr. Brooks fail to clearly identify the genre-making content elements that, allegedly, “overlap” and to document the degree and frequency. They make no attempt to explain the significance of the undisclosed overlaps and why they should disqualify Reality from its own, legitimate genre status. If occasional overlapping subject matter is the disqualifier, then the majority of television genres are indistinguishable. For example, in addition to Game Shows and Reality shows, “dating” routinely appears in Sitcoms, Soap Operas, every form of Drama (Police, Medical, Sci-Fi/Fantasy, etc.), Movies, Talk, and even

¹¹⁵ See <http://www.emmytvlegends.org/interviews/shows/real-people>, <http://www.emmytvlegends.org/interviews/shows/rescue-911>, and <http://www.imdb.com/title/tt0101038/>.

Documentary. Likewise, if the inclusion of “real” or ordinary people in a TV program is the sole determining content element, then News, Documentary, Talk show, and Sports programming are all members of the same genre along with Game Shows and Reality shows.

120. Obviously, television genre, like the literary genres, is not defined by commonplace subject matters such as dating and relationships or by the appearance of ordinary people alone, but instead, is determined by a rubric of multiple content elements such as that identified in my genre analysis section above. As a result, this vague, unsubstantiated, and overblown GSN claim of “overlap” is irrelevant to the question of genre similarity.

121. Although in this proceeding Mr. Brooks takes the position that Reality is not a distinct genre from Game Show programming, he expressed another in his catalog, *The Complete Directory to Prime Time Network and Cable TV Shows, 1946-Present*,¹¹⁶ in which he repeatedly and specifically distinguished Reality shows from Game Shows. Over the course of 1,566 pages, Mr. Brooks categorizes more than 5,000 TV shows. He labels dozens as “quiz” shows (an alternate name for Game Shows¹¹⁷) and dozens more as “Reality” shows. Just a few examples: the series, *The Simple Life*, *Amish In The City*, *The Family*, *Are You Hot?* *The Search For America’s Sexiest People*, and *Beauty and the Geek* are each categorized as a “Reality” show, along with *The Apprentice*, *The Amazing Race*, and *Big Brother* which are “Reality/Competition”, “Reality/Adventure”, and “Reality/Competition” programs, respectively. Simultaneously, Mr. Brooks categorizes *Deal Or No Deal*, *Who Wants To Be A Millionaire*, and

116 See Tim Brooks and Earle Marsh, *The Complete Directory to Prime Time Network and Cable TV Shows, 1946-Present*, (New York: Ballantine Books, 9th Ed. 2007). (“Brooks Directory”).

117 As previously explained, the label “Quiz” was replaced with “Game” in the late 50s to distance the genre from the infamous quiz show scandal of 1958. Although these programs are almost universally called “Game” shows today, in his book, Mr. Brooks sometimes uses the original name. In addition, while not consistent throughout the book, Mr. Brooks appears to divide the usual Game Show genre into multiple categories. The largest one is the quiz show, capturing those shows in which the game’s competition is based on knowledge. Other Game Show categories appear to be those in which the competition is based on physical challenges, panel involvement, and audience participation.

The Newlywed Game - three GSN shows he and GSN identified specifically as evidence of similarity with Reality shows such as those on WE tv¹¹⁸ - in the separate and distinct genre of “Quiz” (Game Show).¹¹⁹

122. I also examined how Mr. Brooks himself classified the programs that ran on GSN and WE tv in the 12 sample weeks of 2009 - 2011. Presumably because it was last reissued in 2007, long before this proceeding began, his catalog included only 16 of the 65 unique WE tv non-movie titles (series and specials). On the other hand, because GSN draws so heavily from classic Game Shows, the directory contains 28 of the total of 47 unique titles¹²⁰ that ran on GSN. All 28 GSN shows – which account for fully 60% of all of the programs that aired on GSN in the sample weeks - are labeled by Mr. Brooks with his alternate name for Game Shows, “Quiz” shows. Notably, he doesn’t label *any* of the shows on either network in these weeks as “relationship or female-oriented”, “real-life talk/relationship”, or anything remotely similar.

123. Moreover, the history of GSN as told by Mr. Brooks in his directory is inconsistent with his position in this proceeding because it clearly distinguishes between the Game Show and Reality programming genres, referring to them as two distinct formats that aired on GSN. After explaining that the network began as “mostly reruns of daytime game shows of the 1970s-1990s”, he goes on to say, “In 2004, the network shortened its name to simply GSN and began experimenting with reality and other nontraditional game show formats”, but, “In 2005, amid viewer complaints, it began shifting back to traditional game shows, although some

118 See Complaint ¶¶ 18, 36; Brooks 2012 Decl., ¶ 7, 9, 81; Reply I. C., p. 31.

119 Mr. Brooks’s unusual take on Reality results in some rather odd categorizations in his book. For example, in spite of all of the publicity about these outrageous, weekly hit Reality series, Mr. Brooks labels as “Documentary” these Reality series: *The Osbournes* (following the on-going antics of the family of the aging rock star, Ozzy Osbourne), *The Girls Next Store* (about Hugh Hefner and his live-in, 20-something, girlfriends), *The Real Housewives of Orange County*, and MTV’s *Real World*. His book calls *Extreme Makeover: Home Edition* an “Educational” show, and *Queer Eye For The Straight Guy* is categorized as “Instructional.”

120 In the cases of *Million Dollar Password* and *Password Plus*, I used the classifications of their predecessor, *Password*

reality remained on the schedule.”¹²¹ Apparently, like Mr. Brooks when he published his directory, GSN’s disgruntled viewers had no trouble distinguishing between Reality and Game Shows in 2005. And it seems that years later they continue to object to even a minor trial of Reality programming on GSN as indicated by both the cancellation of the series *Carnie Wilson: Unstapled* after only nine episodes and the negative reaction to 2012’s brief airing of reruns of Reality-Competition show *Dancing With The Stars*.¹²²

124. The labors by Mr. Brooks to discredit a few of my many third-party sources by carefully juxtaposing out-of-context snippets of text with his own opinionated rhetoric fail to amount to any substance. Moreover, he is unable to obscure the fact that both of the sources he quotes, *Encyclopedia of TV* and *Media Programming: Strategies and Practice*, refer to Reality as a distinct genre or format,¹²³ and that the *Encyclopedia of TV* actually devotes *separate chapters* to each of the many standalone genres, including one for *Reality* and one for *Game Shows*.¹²⁴ On the other hand, neither of these authoritative sources recognizes the new GSN and Brooks conglomeration, a “relationship and female-oriented reality” programming genre or anything similar, and, of course, they do not support that this is a legitimate genre. I am not aware of any published resource recognizing such a genre.

125. In fact, in addition to the scholarly sources I cite in the genre analysis section, Mr. Brooks’s claim that Reality is not a genre is also directly contradicted by leading industry authorities, media critics, video distributors, and online TV databases. Just a few examples are:

121 Brooks Directory, p. 156 (softcover edition).

122 See GSN’s viewer forum at <http://www.gsn.com/forums/showthread.php?t=6266&page=1>.

123 See Beth Seaton, “Reality Programming”, The Museum of Broadcast Communications, <http://www.museum.tv/eotvsection.php?entrycode=realityprogr>; and, Susan Tyler Eastman and Douglas A. Ferguson, *Media Programming: Strategies and Practices* (Boston, MA: Thompson Wadsworth, Eight Ed. 2009), p. 6.

124 See Beth Seaton, “Reality Programming”, <http://www.museum.tv/eotvsection.php?entrycode=realityprogr>; and, Olaf Hoerschelmann, “Quiz and Game Shows”, <http://www.museum.tv/eotvsection.php?entrycode=quizandgame>.

(a) Nielsen, the preeminent television research and measurement authority, includes a chart in its *Nielsenwire* report stating that the “reality genre” has been the dominant genre for 9 of the last 10 years over the Drama, Sports, and Sitcom genres.¹²⁵

(b) The Emmy Awards, the “Oscars” for television, are awarded annually by the television industry’s National Academy of Television Arts and Sciences. Each year, it recognizes outstanding achievement in the production of shows by genre. Between the daytime and primetime awards, Emmy awards are given out in separate categories for each of “Game/Audience Participation,” “Reality,” and “Reality-Competition.” The Emmy awards do *not* have categories for anything resembling “relationship and female-oriented reality” or the other several similar names generated by GSN and claimed to be a genre. Notably, since the award began in 1974 through the 2012 Emmy Awards, only 12 different shows have won in the “Game Show/Audience Participation” category, and GSN has aired 11 of them.¹²⁶ Remarkably, in just the sample weeks of 2009, 2010, and 2011, GSN aired three-quarters (eight) of the 12 shows that have *ever* won the Game Show Emmy!

(c) *The New York Times*, on June 22, 2012, said, “It’s the first foray into the reality genre for both TNT and Imagine Entertainment.”¹²⁷ On January 1, 2012 it stated, “That’s the genre of reality television that presents plain-spoken, often scruffy people.”¹²⁸

125 http://blog.nielsen.com/nielsenwire/media_entertainment/10-years-of-primetime-the-rise-of-reality-and-sports-programming/.

126 For a list of the winners, see Wikipedia, “Daytime Emmy Award for Outstanding Game/Audience Participation Show,” http://en.wikipedia.org/wiki/Daytime_Emmy_Award_for_Outstanding_Game/Audience_Participation_Show and Wikipedia, “List of programs broadcast by Game Show Network,” http://en.wikipedia.org/wiki/List_of_programs_broadcast_by_Game_Show_Network.

127 http://www.nytimes.com/2012/06/24/arts/television/tnts-great-escape-is-reality-tv-journalists-try-it-out.html?_r=1&ref=realitytelevision.

128 http://www.nytimes.com/2012/01/02/arts/television/new-tv-gator-boys-and-american-stuffers.html?_r=1&scp=2&sq=reality%20genre&st=cse.

And on October, 2011 the paper wrote, “In the people-behaving dysfunctionally genre of reality television you’re likely to see...”¹²⁹

(d) *Variety*, perhaps the leading entertainment industry magazine, wrote on January 25, 2012, “USA Network has officially gotten back into the reality genre with a series order for ‘The Moment,’”¹³⁰ and in 2011, it stated, “That would be reality TV, arguably primetime’s dominant genre, ratings-wise.”¹³¹

(e) *Multichannel News*, the cable industry’s leading magazine, wrote, “Cable networks continue to expand into new content genres, unveiling a slate of new original scripted series, reality shows, and documentaries during the cable portion of the Television Critics Association’s 2013 Winter Press Tour”, and, “Several cable networks will take the reality genre into unique and unusual directions...”¹³² and, “Besides reality, the network is building out its other genres...”¹³³

(f) Netflix, the world’s leading distributor of internet-delivered television programming, organizes its TV shows into genres. “Reality” is one of the TV genres listed for streaming, and I was able to locate within that genre five of the WE tv Reality series¹³⁴ that ran in the sample weeks but none of the GSN shows. Moreover, Netflix does not maintain a “relationship and female-oriented reality” TV genre listing (nor the other GSN similar variants).

129 <http://tv.nytimes.com/2011/10/24/arts/television/monster-in-laws-reality-show-on-ac-review.html>.

130 <http://www.variety.com/article/VR1118049170>.

131 <http://www.variety.com/article/VR1118037566?refCatId=14>.

132 R. Thomas Umstead, “Cable Branches Out: Networks Explore New Genres in 2013”, January 14, 2013, <http://www.multichannel.com/archive/cable-branches-out/141170>, and, R. Thomas Umstead, “At TCA, New Twists on Reality”, August 23, 2010, <http://www.multichannel.com/content/tca-new-twists-reality>.

133 Andrea Morabito, “ABC Investigating Reality Space”, <http://www.multichannel.com/tv-awards-shows/quick-hits-tca-winter-tour/139370>.

134 See “NETFLIX TV GENRES AS OF 9-13-12,” CV Exh. 230 (Egan Ex. 11) or <http://movies.netflix.com/WiAltGenre?agid=9833&plagid=83> (subscription required). The WE tv series located were: *Braxton Family Values*, *Bridezillas*, *My Fair Wedding*, *Platinum Weddings (Best of)*, and *Girls Who Like Boys Who Like Girls*.

(g) Tribune Media Services assigns a genre to the programs on every network in its daily guide listings. Reality is one of its standalone TV genres as is Game Show. TMS does not have a “relationship and female-oriented reality” genre or anything like GSN’s multiple variants of its label.

(h) The online TV database IMDb and Apple’s iTunes video service each include Reality as a standalone television genre.¹³⁵ Again, I was unable to find anything similar to a “relationship and female-oriented reality” genre in either.

126. In contrast to the readily-available and overwhelming body of reliable evidence validating the genre of Reality television, to bolster his position, Mr. Brooks could quote only Wikipedia (an online encyclopedia not considered an authority because its information is provided by anyone wishing to contribute).¹³⁶ However, even the sole Wikipedia entry he cites is fatally-flawed by blatant, factual error, and its source (MSNBC) actually directly contradicts Wikipedia and Mr. Brooks when it states, referring to *Deal Or No Deal*, “It’s a game show, not a reality show.”¹³⁷

127. The claims by Mr. Brooks and GSN’s Reply¹³⁸ that GSN’s Game Shows aired in recent years were largely in a genre indistinguishable from Reality are incompatible with GSN’s multiple and much-ballyhooed 2012 public announcements to the contrary detailed in the genre analysis section above (V.A.2.), including that it will “transform” its programming in 2012 – 13

135 See *Downsized*, IMDB, <http://www.imdb.com/title/tt1713151/>; and, *Braxton Family Values*, “iTunes Charts”, <http://www.apple.com/itunes/charts/tv-shows/braxton-family-values/rocky-relationships/>.

136 Brooks 2012 Decl., ¶ 81.

137 The Wikipedia entry Mr. Brooks quotes says, while referring to six shows it names, “These factors....lead many people to group them under the reality TV umbrella as well as the traditional game show one”. Wikipedia then cites an MSNBC.com article as its only support for this claim. Remarkably, the MSNBC article actually refers to just one of the six shows (*Deal Or No Deal*, and in doing so, it contradicts the opinion attributed to it by Wikipedia saying, “It’s a game show, not a reality show”! See http://en.wikipedia.org/wiki/Reality_television, and note 23, Gael Fashingbauer Cooper and Andy Dehnart, “How can I audition for reality shows?”, MSNBC, <http://today.msnbc.msn.com/id/16530873> (both accessed Nov. 30, 2012).

138 Brooks 2012 Decl., ¶¶ 76, 81; Reply I. C., pp. 30-31.

from its current status as a “museum of game shows”; that, “[i]n addition to the network’s popular studio-based game shows, GSN is broadening its programming and brand promise to incorporate real-life games”; and that, “[t]his announcement is part of GSN’s overall development strategy to broaden into other programming genres in addition to the network’s popular studio-based game shows.”

128. Moreover, the denials by Mr. Brooks and GSN of the existence of the Reality genre are also inconsistent with *GSN’s own repeated statements in the Complaint and the Reply* that it airs Reality programming, describing its shows as “relationship and female-oriented reality”, “female-oriented reality programming outside of the relationship genre”, “reality and game shows”, and “reality programming”¹³⁹

129. Mr. Brooks attempts to make much of the fact that I categorized 13 WE tv Reality shows differently than WE tv did when coding them using Nielsen’s codes for Nielsen’s purposes.¹⁴⁰ Mr. Brooks misrepresents the meaning of these codings and overstates their significance. First, Nielson does not refer to genre at all in its description of these codes in its National Reference Supplement.¹⁴¹ Second, they are not meant to represent any conclusion by WE tv regarding a program’s genre, but rather, are an attempt by WE tv to fit its program within one of Nielsen’s pre-ordained, and at times, ill-fitting, menu of codes. As a result, they are not considered useful by WE tv for classifying its programs.¹⁴² Nor can classifications by WE tv staff using inflexible, Nielsen-determined labels, done when a show premieres in its first season (seven years ago in one of these cases), and with no formal genre analysis, substitute for the

139 Complaint, ¶¶ 18, 36; Reply, “SUMMARY”, p. i., fourth paragraph (in which GSN specifically distinguishes its Game Shows from its Reality shows saying, “notwithstanding the demonstrated reality that game shows of the kind that GSN offers, as well as its reality programming offerings...”).

140 Brooks 2012 Decl., ¶ 80.

141 See Nielsen’s *National Reference Supplement 2011-2012*.

142 See *Game Show Network, LLC v. Cablevision Systems Corp.*, Surreply of Cablevision Systems Corp. (filed Feb. 9, 2012), Exh. C, Supplemental Declaration of Carol Smith, Vice President, Research for WE tv.

actual genre analysis that I conducted. Moreover, when speaking specifically of the programs' genres in press releases and database classifications, WE tv and independent sources identified all of the 13 shows that Mr. Brooks questioned as Reality shows.¹⁴³

2. Regarding Target Programming: GSN and Mr. Brooks fail to provide a target programming analysis.

130. As discussed in section V. B., above, target programming is that content which a network seeks to acquire and to produce in order to distinguish itself and attract its target audience. My target programming analysis presented in section V. B. above employed a scientifically-designed, empirical methodology to identify the subject matters of virtually *all* of the programming aired for three full years on GSN and WE tv. I also compared the networks' website content, their on-air and online creative and branding elements, their own public descriptions of themselves, and several third-party characterizations of their programming, each of which clearly articulates the target programming of GSN and WE tv.

131. Both GSN and its expert evidence an unwillingness or inability to recognize and analyze this fundamental content element, and as a result, fail to address this *Second Order* – specified programming factor.

132. Moreover, each previously mistook the extensive *target programming* discussion in my 2011 Declaration for one regarding *target audience*. Echoing Mr. Brooks in its Reply's section titled "Target Audience" and confusing target programming and viewing audience, GSN

143 See, e.g., WE tv, "WE tv Reveals the High-Pressure World of Manhattan's Elite Bridal Consultants in Amsale Girls," Press Release (May 23, 2011); <http://lanelanewyork.blogspot.com/2011/06/amsale-girls-new-we-tv-reality-wedding.html>; WE tv, "For Better...Or For Worse! WE: Women's Entertainment Presents 'Bridezillas'," Press Release (May 2, 2004); http://www.amcnetworks.com/release_release_press.jsp?nodeid=4266; WE tv, "Hot Tubs, Tattoos, Skydiving, Fulfilling One's Dreams No Matter What Age. Who Says Growing Up Means Growing Old? [Sunset Daze]" Press Release (Mar. 30, 2010); http://abcnews.go.com/Nightline/Retirement/golden-girls-sunset-daze-reality-tv/story?id=10618577#.T_stz5HNlft. The comprehensive online TV database, IMDB.com, classifies 12 of the 13 shows GSN disputes as Reality and one as Documentary. TVtango.com, a similar online TV database, classifies all 13 as "Reality."

criticized my extensive target programming analysis, even admitting to finding it “bewildering” that I would actually bother to identify and contrast the content put on the TV screen by each network rather than just rely on audience ratings.¹⁴⁴ As I referenced above in section V. B. of this testimony, a network’s *target programming is the content it seeks to acquire and display* in order to distinguish itself and attract its target audience. On the other hand, a network’s target audience is *the viewer (distinguished by demographic profile) who the network considers its highest priority to reach and who it is actively seeking to attract.*

VI. GSN IS NOT AND WAS NOT SIMILAR IN AUDIENCE TO WE tv AND WEDDING CENTRAL

133. My analysis of whether or not GSN and WE tv are/were similar in audience examines the fundamental factors of *target audience* and *actual viewing audience* as revealed through *ratings* and *other research data*. Target audience and ratings are two of the factors specified for consideration in the FCC’s Second Report. As mentioned above, target audience is the viewer who the network considers its highest priority to reach *and* who it is actively seeking (“targeting”) as evidenced in its use of the tools at its disposal, most notably, its programming, marketing, branding, and public relations. Target audience should not be confused with *actual viewing audience*, that is, *who is watching* the network.

A. GSN Is Not Similar In Target Audience To WE tv.

1. An Abundance Of Consistent Evidence Makes It Clear That WE tv’s Target Audience Is Females 18 - 49 and 25 - 54.

134. WE tv makes it abundantly clear that its primary target is an audience of Women 18 – 49 and Women 25 - 54. In my research, I have found that WE tv strictly adheres to its

¹⁴⁴ See Brooks Reply Decl., ¶12, and Reply, I. A. 2., p. 17.

specific target, and its content, branding, and public relations efforts are each designed to help achieve the goal of reaching that one target above all others.

135. As discussed in detail above in the target programming section, the programming on WE tv is consistent in its delivery of content for and about women in the career-building and family-centered phases of their lives. Its branding, public relations, and public affairs efforts amount to a multiplicity of coordinated tactics to reach that same Women 18 – 49 and Women 25 – 54 target audience which can be seen in the following.

136. WE tv.com web site. The content and look and feel of the network's web site communicate exactly who and what the network is all about. It opens on the pastel and white home page and its banner tagline "life as WE know it" with its photos of women in these transformative stages of family life and then continues to the clear-eyed self-description in the "Who WE are tab." From the "Sites WE love" tab's listing of dozens of web sites about shopping, fashion, beauty, home, bridal, pregnancy, etc. to the "WE Volunteer" tab about its "WE Empowers Women" public affairs initiative, the target audience is unmistakable. *See* CV Exh. 230 (Egan Ex. 6).¹⁴⁵

137. We TV presentations to MVPDs. WE tv's affiliate sales team regularly presents to its cable, satellite, and telco distributors, updating them on the performance of the network in its key demos. Included at CV Exh. 230 (Egan Ex. 12) are two excerpts from such presentations.

[REDACTED]

[REDACTED]

[REDACTED]

¹⁴⁵ As explained above, this description, as well as that of GSN's site which follows, is based on the web site as of October 26, 2011. Nonetheless, as of October 6, 2012, each of the sites remained generally similar to its 2011 version, including in look and feel, functionality, graphics, and content (other than the individual shows which, of course, change on an on-going basis).

[REDACTED]

[REDACTED]

138. WE tv mall tour. In 2010, WE tv created a high-profile wedding experience for brides to learn from WE tv wedding experts. The wedding experience was structured to tour the country for five months, setting up in shopping malls, and working with the local MVPD affiliates to promote the event, entirely focused on young brides.

139. WE tv's 2010-11 upfront presentation to the national advertising and programming communities presented an overview of the network's programming and digital initiatives, its audience delivery performance, and a study it commissioned from Insight Research group to gauge the impact of the recession on women. Two slides from the presentation are included as CV Exh. 230 (Egan Ex. 13). [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

140. WE tv's public affairs initiatives. "WE Empowers Women", WE tv's nationwide public affairs initiative, was launched in 2005 and ran through 2011. The initiative was dedicated to empowering women to lead fulfilling lives and to achieve their full potentials using the resources of partnerships WE tv helped create between pro-social organizations, local cable operators, and WE tv itself. The program sponsored a campaign called "WE Volunteer" that continues in 2012 to encourage women to volunteer to help a cause about which they are passionate. More can be read about "WE Volunteer" at that tab on the network's web site,¹⁴⁶ and

¹⁴⁶ <http://www.wetv.com/shows/we-volunteer>.

WE tv's presentation that was used by its affiliate sales team to enlist MVPD affiliates in the "WE Empowers Women" program can be found at CV Exh. 230 (Egan Ex. 14).

141. WE tv's advertising sales materials for potential clients. The "WE Fact Sheet (2010/2011)" and the "WE tv Marketbreaks – 1Q11" documents are each one page ad sales pitch pieces, included as CV Exh. 230 (Egan Ex. 15), that are given to potential advertisers. Using different metrics, each one details the network's audience delivery, focusing entirely on its key demos, the target audience of Women 18 – 49 and Women 25 – 54.

142. WE tv's internal competitive ratings and audience delivery performance tracking reports and presentations. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

143. WE tv's programming and branding initiatives to mine the African-American women demos within its target audience. With the great success of its hit Reality show, *Braxton Family Values*, WE tv began to dig deeper within its female target demo to bring in additional African-American viewers. As Multichannel News wrote in a cover feature story last year:

"Networks such as WE... are courting influential 18 – 49 year old African-American female viewers – who watch more television than any other demographic – with mostly reality-based programming featuring black women like the Braxton clan. We TV has even dedicated a new night of original programming to shows aimed at African-

147 See CV Exh. 122 (WE tv Presentation - Brand Competitive Differentiation).

American females, featuring *Braxton Family Values* and the upcoming reality series *Mary, Mary* based on the lives of the famed gospel duo.”¹⁴⁸

144. Since that story was published in 2011, the first season of *Mary, Mary* aired and the series has been renewed for a second season. Apparently in an effort to further align the series with this demo, the duo performed at 2012’s *Essence* Music Festival in New Orleans which was expected to draw more than 400,000 attendees, mostly African-American women. Multichannel News wrote, “For cable networks looking to target African-American female viewers...the *Essence* Music Festival remains the perfect venue.”¹⁴⁹

145. In May 2012, WE tv increased its program offerings focused on this demo with the premiere of another original, weekly Reality show, *L.A. Hair*, which follows the on-going drama in the salon of a Hollywood, celebrity hair stylist, the African-American woman, Kim Kimble. And, recently, WE tv premiered a spin-off of *Braxton Family Values* starring the newly-married Braxton sister, Tamar, entitled *Tamar & Vince*. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] Both are included at CV Exh. 230

(Egan Ex. 17).

2. The Evidence Reveals That GSN’s Primary Target Audience Is All Adults 18+ Interested in Game Shows and Game Playing.

146. The abundant evidence makes it clear that GSN’s primary target audience throughout the relevant period of 2009, 2010, and 2011 was all Adults (also known as “Persons”)

¹⁴⁸ http://www.multichannel.com/article/477012-Black_Is_Beautiful.php.

¹⁴⁹ http://www.multichannel.com/article/486845-Essence_Music_Fest_Brings_Cable_Stars_to_Nawlins_Stages.php.

18+ interested in Game Shows and game playing. Although GSN claims that it actively targeted then (and now) one specific segment of these adults, namely Women 18 – 49 and Women 25 – 54,¹⁵⁰ the overwhelming preponderance of evidence belies that claim. I did not find a consistent pattern of GSN using its programming, marketing, branding, and public relations tools to attract, first and foremost, those narrowly-defined demos. Furthermore, any effort by GSN to target a female demographic was, at most, a distant second place to the broad-based, gender neutral, adult audience it sought to attract to the network overall (perhaps even third place, behind adult men).¹⁵¹

147. Programming. Above, in the target programming section, I discussed GSN's programming at length, explaining my findings that it did not measure up to the claim of being primarily targeted to 18 – 49 and 25 – 54 year old women. I concluded that the programming is actually primarily focused on the games themselves, lacks any other consistent targeting theme, and that the motivating characteristic of a GSN viewer is not gender or age, but rather, an appetite for TV games. The research company [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

150 Throughout the Complaint, GSN repeatedly misstated the WE tv target audience as narrower and older than it actually was, stating it as Women 25 – 54 rather than Women 18 – 49 and Women 25 – 54. Also in the Complaint, GSN claimed *only* the Women 25 – 54 demo for its own target audience. After my 2011 declaration pointed out GSN's error regarding WE tv's target audience and the difference between that and GSN's claimed target demo, GSN's Reply, without explanation, significantly expanded the age range in which it claims to compete with WE tv to include Women 18 – 49.

151 For example, *Carnie Wilson: Unstapled* and *Love Triangle*, two of the small handful of shows GSN claimed exemplified its "female-oriented" programming, were each cancelled within months of their launches and the episodes were then repeated many times before disappearing for good. In contrast, GSN devoted large blocks of primetime air to the male-audience dominated poker Gaming shows every week during each of 2009, 2010, and most of 2011. According to its internal correspondence, GSN [REDACTED]. See GSN_CVC_00139094.

152 [REDACTED]

148. GSN.com web site. The content and look and feel of GSN.com communicate this broad target audience. From its 2011 banner, “THE WORLD NEEDS MORE WINNERS”, to the home page’s busy graphic design with lots of bright colors set against a blue template and its many ways to play games, to the tabs available for investigation, including “Casino”, “Cash Competition”, and “All Games”, it is clear that this is a home for game enthusiasts. Within the site, there is no disproportionate use made of images, graphics, or topics that would have greater appeal to the average woman than to the average man. Nor was there any pattern indicating that a specific 18 – 49 or 25 - 54 year old age range was being targeted.

149. GSN’s Press Releases. In reviewing the releases available at GSN.com for those addressing its target audience, I noted one that quotes EVP, Amy Introcaso-Davis, explaining that GSN’s core is “the whole family”¹⁵³. Another touted the ratings for the male-oriented *High Stakes Poker* series. David Schiff, GSN’s Vice President of Programming & Development, is quoted as saying, “We’re very gratified to see this season of HIGH STAKES POKER performing so well among these important demographic groups,” which the release states as: “Adults 18 – 49, Adults 25 – 54, and Men 25 – 54.”¹⁵⁴ Neither of these comments supports GSN’s claims that it primarily targeted Women 18 – 49 and 25 - 54.

150. Even GSN’s press release for *The Newlywed Game*, a series that GSN has repeatedly characterized throughout this proceeding as targeted primarily to women, plainly states the show’s “target demos” as adults of both genders – Persons 18-49 and Persons 25-54 –

153 <http://corp.gsn.com/press/releases/gsn-unveils-its-new-programming-and-development-slate-during-network-upfront-event-ne>.

154 <http://corp.gsn.com/press/releases/sixth-season-gsn-s-high-stakes-poker-shows-winning-hand-key-demos>.

along with women 25-54, followed by its touting of the show's ranking as "#1 in Household Delivery, P18-49, and P25-54" compared to other GSN shows.¹⁵⁵

151. GSN's presentations to MVPDs and marketing partners. I requested and received from Cablevision the affiliate presentations GSN made to it that were still available. None claimed reaching Women 18 – 49 and 25 – 54 to be GSN's primary audience target. However, one did have a "SUMMARY" page that described its audience as follows: [REDACTED]

[REDACTED]

[REDACTED] [REDACTED]

[REDACTED] [REDACTED]

[REDACTED] The excerpted pages from the presentation are included as CV Exh. 230 (Egan Ex. 18).

152. I also note a GSN presentation dated February 8, 2011 prepared for delivery to Cablevision after the repositioning.¹⁵⁸ In addition to other topics, it [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] Similarly, in an untitled GSN document from 2010 discussing the network's achievements since 2007, it also [REDACTED]

[REDACTED]¹⁵⁹

153. GSN's focus on reaching adults, both male and female, was also made clear in its

[REDACTED]

¹⁵⁵ See GSN_CVC_00000051

¹⁵⁶ See CV Exh. 43 at 23 (2008 GSN Presentation for Comcast).

¹⁵⁷ See CV Exh. 50 at 30 (2009 GSN Presentation for Comcast).

¹⁵⁸ See CV Exh. 162 (GSN Presentation for Cablevision).

¹⁵⁹ See GSN_CVC_00014834 – 00014856.

[REDACTED]

[REDACTED]

154. GSN's Annual Advertising Upfront Presentations. I analyzed the 2009, 2010, and 2011 GSN upfront presentations made to the national advertising community, including the

[REDACTED]

[REDACTED]

155. [REDACTED]

[REDACTED] Like the other GSN materials I've reviewed, these highlight a [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

156. GSN's internal meeting presentations. Among the documents produced by GSN during the discovery process, I found [REDACTED]

[REDACTED]. As was the case with the other materials I address in this section, these did not make a plausible case for a [REDACTED]

[REDACTED] Again, virtually all of the materials speak of [REDACTED]

[REDACTED]. Two examples of the many such documents are representative of the majority.

160 [REDACTED]
161 [REDACTED]
162 [REDACTED]

- [REDACTED]
[REDACTED]
[REDACTED]
- [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

157. GSN-originated advertising sales materials for MVPDs. As is typical with most networks, GSN's cable, telco, and satellite affiliates can log into the network web site to retrieve promotional and local advertising sales materials put there by the network for affiliate use. I asked Cablevision to forward such materials as it was able to retrieve. Little was available, but I did receive some materials on November 18, 2011 that were obtained at that time. Cablevision's more recent visit to the site on August 21, 2012 did not provide any additional relevant materials.

158. One Fall 2011 document I reviewed that is relevant to the target audience discussion is the GSN Style Guide (excerpt at CV Exh. 230 (Egan Ex. 19)). [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

163 [REDACTED]
164 [REDACTED]

159. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

160. Cable Advertising Bureau (“CAB”) web site.¹⁶⁶ The CAB is the cable industry’s long-standing advertising sales trade organization. On its site, it profiles all of the ad-supported cable networks, including a statement of “Viewer Targeted”. Its profile of GSN does *not* support the Complaint’s stated target audience. Instead it lists the “Viewer Targeted” by GSN as the much broader demographics,” Persons 25 – 54” and “Women 25 – 54”.

161. GSN’s public affairs. Being aware of WE tv’s multi-year program, “WE Empowers Women”, I searched the internet and GSN.com to determine if GSN has made a similar effort to align and brand itself with a target audience and also requested that Cablevision’s counsel do so via Lexis-Nexis. We did not find any such on-going program for the GSN television network.

162. In summary, while the evidence unanimously suggests that WE tv’s target audience is well-defined as Women 18 – 49 and Women 25 – 54, the preponderance of evidence does not support the same narrow target for GSN. In fact, it clearly articulates that the network, as a whole, has a much more broadly composed primary target audience of Adults 18+ (i.e., Persons 18+).

165 Complaint, ¶ 36, note 64, and Brooks 2012 Decl., ¶ 21.

166 <http://www.thecab.tv/php/networkprofiles/12profileData/2012pdf/12GSN.pdf>.

163. As will be shown in the next section, GSN's actual viewing audience skews

compared to that of most cable networks, especially in contrast to WE tv's.¹⁶⁷

As should be expected, for sales purposes, GSN highlighted the [REDACTED] year old portion of that audience. In doing so, as its press releases, MVPD and marketing partner presentations, ad sales upfront materials, internal meeting presentations, and MVPD and CAB advertising resources described above make clear, GSN more often than not [REDACTED]

B. GSN Is Not Similar In Actual Viewing Audience To WE tv.

164. In contrast to a network's target audience that it is *seeking* to attract, actual viewing audience is the audience that *is actually watching*.

165. I examined and compared the actual viewing audiences of GSN and WE tv by the two most commonly reported metrics in television audience research: first, the gross *quantity of households* (“HH”) watching, and, second, the *composition of the viewers* within those HH, *i.e.*, the demographic makeup of the individuals watching (“demos”).

167 For example, while GSN placed [REDACTED] when ranked by rating in the W18 -
 34 demo, it moved all the way up to [REDACTED] when ranked by rating in the W65+ demo. Nielsen, Arianna
 version 8.3, NY Cable (Hardwired), Live+3, Total Day (9am – 4am), 2010.

168 GSN's shifting public statements of multiple, different important/key/target audiences as seen in some of the documents I cite above – "broad-based", "Adults", "Men", "Women" – seems to have confused and, at times, exasperated even its own executives. GSN's correspondence reveals [REDACTED]

See GSN_CVC_00046691-92, GSN_CVC_00042202, and GSN_CVC_00030254.

166. My comparisons of the quantity of viewing HHs use audience viewership data obtained from each of Nielsen and Cablevision. Nielsen reports a HH rating which is the percentage of total TV HH that are viewing a network, on average, at any given moment of an entire day (“Total Day”) or a daypart (primetime and daytime) over the course of a specified period of time such as a month or year. The rating is a mathematical calculation intended to represent a snapshot of viewership at an “average” moment in time during that period of the day in that month or year. As will be explained further below, Cablevision purposely captures different audience viewership data. [REDACTED]

[REDACTED]

[REDACTED] Both Nielsen and Cablevision capture viewing in a representative sample and then statistically project the results across the total population being reported.

167. My comparisons of the demographic composition of the viewers of GSN and WE tv use audience data obtained from Nielsen and GfK MRI.¹⁶⁹ Because Nielsen’s demo ratings evince viewership for specific combinations of age and gender, they enable a direct comparison of the networks’ audiences within the precise demo(s) alleged in the Complaint (as later expanded in the Reply) to be shared as target audiences by GSN and WE tv. The GfK MRI research used displays audience composition by one demographic factor, gender, and ranks all reported cable networks accordingly.

168. Representativeness of the audience data. Cablevision’s cable system at issue is unique as a result of Cablevision’s highly-clustered geographic footprint. It is almost entirely

¹⁶⁹ GfK MRI is an industry leader and standard in market and media research that has been in business in the United States since 1979.

located within the NY DMA,¹⁷⁰ so the *only* audience information that can possibly be representative of Cablevision's subscribers and that one could confidently assume speaks of their viewing behaviors and demographic makeup is that derived from a local, NY DMA sample. National viewership information, including the national Nielsen ratings and the national Beta Research Corp. programming network viewership studies used by GSN and its declarants, is derived from national samples purposely composed to be representative of the United States as a whole and to produce information about only national viewing behaviors. As a result, *national sample data and national viewership information should not be assumed to be representative of Cablevision's subscribers' viewing behaviors*. Therefore, comparisons and conclusions based on national data are not relevant to an analysis of actual viewing audiences among Cablevision's subscribers, and it would not be credible research practice to directly link the national ratings with viewership in the Cablevision cable system.

169. Fortunately, several highly-respected and commonly-used sources of audience data that are superior matches for Cablevision's footprint are readily available. Those I used are: (1) Nielsen's NY Cable (Hardwired) audience ratings and demographic data reports which include only the HH subscribing to cable and telco systems throughout the NY DMA, constituting a reasonably close proxy for Cablevision's subscribers (2) Nielsen's Cablevision households only ratings reports, which includes solely the HH subscribing to Cablevision in the NY DMA (3) GfK MRI audience demographic reports for the NY DMA (all TV HH since the report is not provided for hardwired homes only). In addition, although not well-known because of its proprietary nature, I requested and was provided [REDACTED]

[REDACTED]

¹⁷⁰ The Complaint is specifically and only focused on Cablevision's NY-NJ-CT cable systems. See Complaint, ¶ 2 and note 2.

170. Reliability of the data. The Nielsen and GfK MRI data presented herein are typical of those used for a variety of sales purposes throughout the U.S. as a whole, the NY DMA, and the Cablevision system by itself. The ratings express the numbers to the hundredth place which is how they are regularly stated in the normal course of business,¹⁷¹ presumably because cable network ratings are such small numbers that relative performance among many can only be distinguished by calculating to the hundredth place. Nonetheless, the ratings are reliable according to Nielsen. It is important to remember that reliability is determined largely by the size of a *sample*, not by the size of a *rating*. For this reason, Nielsen designs robust samples.

1. A Comparison Of Audience Size By Household Ratings Reveals That WE tv's Audience Varied Dramatically In Size Between Daytime And Primetime, While GSN's Was Comparatively Stable, Indicating That Total Day Averages For Household Ratings, By Themselves, Can Be Misleading In An Investigation Of Whether Or Not Two Networks Have Similar Actual Viewing Audiences.

171. Utilizing Nielsen's data for the NY Cable (Hardwired),¹⁷² I first compared the Nielsen ratings for Total Day (defined as Monday – Sunday, 9am – 4am to exclude paid programming, *i.e.*, “infomercial”, hours) for each of the two networks among all households (*i.e.*, “Total Households” or “HH”) for each of the full years of 2009 and 2010. In each year, WE tv drew a [REDACTED]

171 For example, see the WE tv advertising sales division's client leave-behind piece and its internal competitive tracking reports in CV Exh. 230 (Egan Ex. 15 and 16, respectively).

172 All Nielsen NY DMA (Hardwired) ratings exclude 1/1/09 – 1/28/09 since Nielsen had not yet begun reporting Live+3 ratings.

<u>Total Households Rating - Total Day</u>		
	<u>2009</u>	<u>2010</u>
GSN	[REDACTED]	[REDACTED]
WE tv	[REDACTED]	[REDACTED]
Nielsen, Arianna version 8.3, NY Cable (Hardwired), Live + 3.		

172. Next, I compared the two networks' HH ratings in the daytime only daypart, 9am – 4pm, and found that [REDACTED]

[REDACTED]

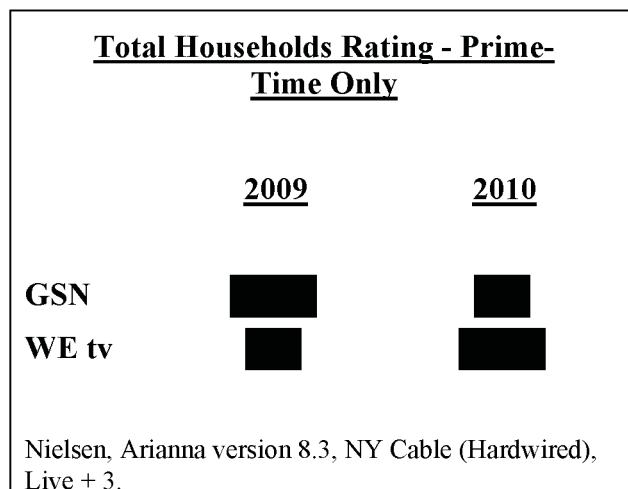
<u>Total Households Rating - Daytime Only</u>		
	<u>2009</u>	<u>2010</u>
GSN	[REDACTED]	[REDACTED]
WE tv	[REDACTED]	[REDACTED]
Nielsen, Arianna version 8.3, NY Cable (Hardwired), Live + 3.		

173. Last, I compared HH ratings in primetime, 8pm – 11 pm, for each year. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]



174. When the day turned from daytime to primetime, GSN's ratings [REDACTED]

[REDACTED] Based on my review of the programming schedules and the individual shows of each network, my expectation is that this dynamic is a result of two factors.

175. The first is WE tv's program scheduling strategy. WE tv scheduled its best-known marquee programs, often their first runs on the network, fairly heavily during this daypart. Some examples are the Sitcom *The Golden Girls*; the most popular Hollywood theatricals such as *Dirty Dancing*; two well-known original Reality series, *Bridezillas* and *My Fair Wedding*; and in 2011, its high-profile Reality series, *Braxton Family Values*, the season premiere of which was basic cable's top telecast for Women 18-34 on Thursday, November 10, 2011, according to Hollywood Reporter newspaper.¹⁷³

176. The second factor causing the far more significant primetime total households rating increase for WE tv relative to GSN's increase is the *demographic makeup* of the two networks' viewing audiences. Based on my review of the target audience information discussed

¹⁷³ Season 2 of WE tv's 'Braxton Family Values' Opens Strong, THE HOLLYWOOD REPORTER, Nov. 14, 2011, at <http://www.hollywoodreporter.com/live-feed/season-2-we-tvs-braxton-261195>.

above as well as the demographic rating and qualitative information discussed in detail further below, I conclude that WE tv's [REDACTED] is also due – perhaps primarily so - to its audience having a much higher proportion of younger, working women who cannot watch WE tv during the daytime on weekdays.

177. With a difference of approximately [REDACTED], it would be accurate to characterize GSN and WE tv as fairly close in Total Day, Total HH, ratings. However, while their averages for the entire day were reasonably close, their actual HH ratings at any moment in time during the day appear to have been very different due to the fact that WE tv's ratings dramatically increased in primetime versus daytime while GSN's ratings remained comparatively stable. Moreover, within the context of all cable network ratings, one can see that this proximity of network HH rating averages for a Total Day is not unique to WE tv and GSN. Of the 67 cable networks reported by Nielsen in 2009 and 2010 in this same market, [REDACTED] [REDACTED] of WE tv's ratings. However, since the programming on the seven additional networks is so very different from WE tv's, one should not expect their audiences to be similar in composition to WE tv's. They are: boy-focused, Disney XD; thrill-seeking, "Not reality. Actuality" network, truTV; business news-centric, CNBC; Soap Opera-full, SOAPnet; Natural Geographic TV; classic TV show specialist, TV Land; and animal-focused, Animal Planet. Total Day HH ratings identify only average quantities, and even then, they are measures of HHs, not the audiences within them watching. Clearly, Total Day HH ratings *by themselves* can be misleading in an investigation of whether or not the actual viewing audiences of two networks are similar.

2. An Audience Size Comparison Of The Two Networks Using Cablevision's Audience By Network Reports Evinces That WE tv Is Viewed By A Far Larger Percentage Of Cablevision's Customers.

178. Next, I compared actual viewing audience size using [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

179. [REDACTED] but instead, a viewership *reach* and *quantity* report. As explained earlier, reach is the cumulative total of unique (unduplicated) subscribing households that watch a channel over a month and a year. Reach is especially insightful information for an MVPD because its revenues are almost entirely based on month-to-month subscriptions. Whereas ratings are important to an advertiser because they report the raw number of *undifferentiated* viewers at a moment in time, reach indicates the percentage of *unique (different)* subscribers that actually watch a channel over the month and year, providing the MVPD with some insight into how useful and valuable the channel is across *all* of its customer base. Quantity is the total amount of hours a channel is viewed during that period.

180. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

181. Apparently the poor GSN reach performance was not limited to Cablevision's cable system. In reviewing the documents produced by GSN during the discovery process, I note [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

182. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

174 See, for example, CV Exh. 49 at 11 [REDACTED] CV Exh. 84 at 14

[REDACTED], CV Exh. 143 at 34 [REDACTED], and CV Exh. 193 at 48 [REDACTED].

See also Deposition of Kelly Goode, January 17, 2013, pp. 121-123, Deposition of Derek Chang, January 15, 2013, pp. 77-78.

175 See GSN_CVC_00092073.

176 See CV Exh. 143 at 22 [REDACTED]

183. [REDACTED]

[REDACTED] Notably, the changing relative performances of the two networks' ratings in the dayparts seem to be indicative of very significant differences in programming strategy and audience demographic composition.

3. A Comparison Of Audiences Using Nielsen Ratings Makes It Clear That GSN's Viewing Audience Is Not At All Similar to WE tv's In Demographic Composition, Specifically In The Demos Alleged By GSN To Be The Audience Target For Both Networks And The Substance Of The Similarity, Women 18 – 49 and Women 25 – 54.

184. Because they identify the age and gender makeup of the people watching, Nielsen's demographic ratings can be used to compare the two program networks by their performances in the precise demos claimed by GSN to be their common and competitive target audience (Women 25 – 54 and Women 18 - 49). I also compared GSN and WE tv's audiences in the Women 18 – 34 subset that I had determined via my target programming and audience research to be a secondary emphasis within the WE tv target audience. In all of these demos,

[REDACTED]

[REDACTED]

[REDACTED]

<u>Women 18 - 34 Rating - Total Day</u>		
	<u>2009</u>	<u>2010</u>
GSN	[REDACTED]	[REDACTED]
WE tv	[REDACTED]	[REDACTED]
Nielsen, Arianna version 8.3, NY Cable (Hardwired), Live + 3.		

<u>Women 18 - 49 Rating - Total Day</u>		
	<u>2009</u>	<u>2010</u>
GSN	[REDACTED]	[REDACTED]
WE tv	[REDACTED]	[REDACTED]
Nielsen, Arianna version 8.3, NY Cable (Hardwired), Live + 3.		

<u>Women 25 - 54 Rating - Total Day</u>		
	<u>2009</u>	<u>2010</u>
GSN	[REDACTED]	[REDACTED]
WE tv	[REDACTED]	[REDACTED]
Nielsen, Arianna version 8.3, NY Cable (Hardwired), Live + 3.		

185. As was the case for the total households ratings, [REDACTED]

[REDACTED]

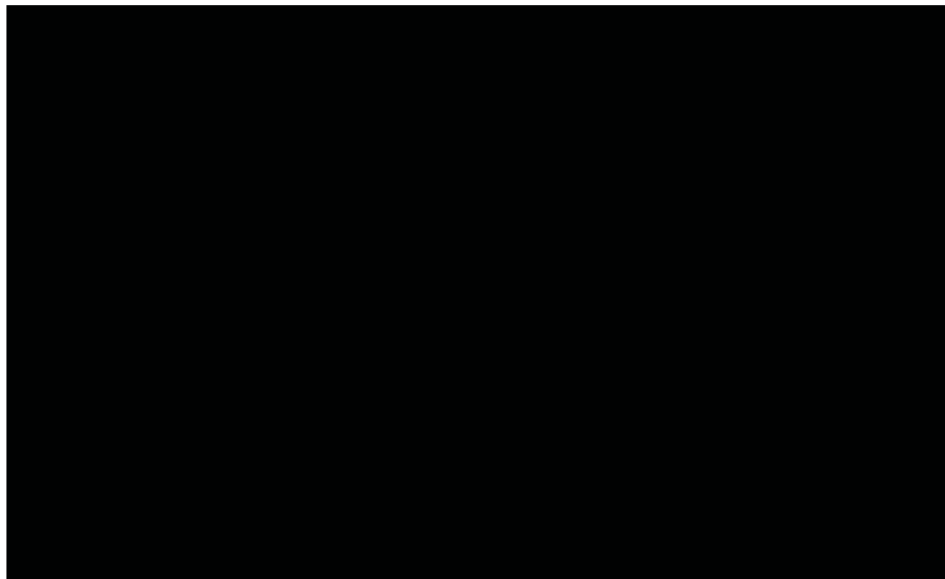
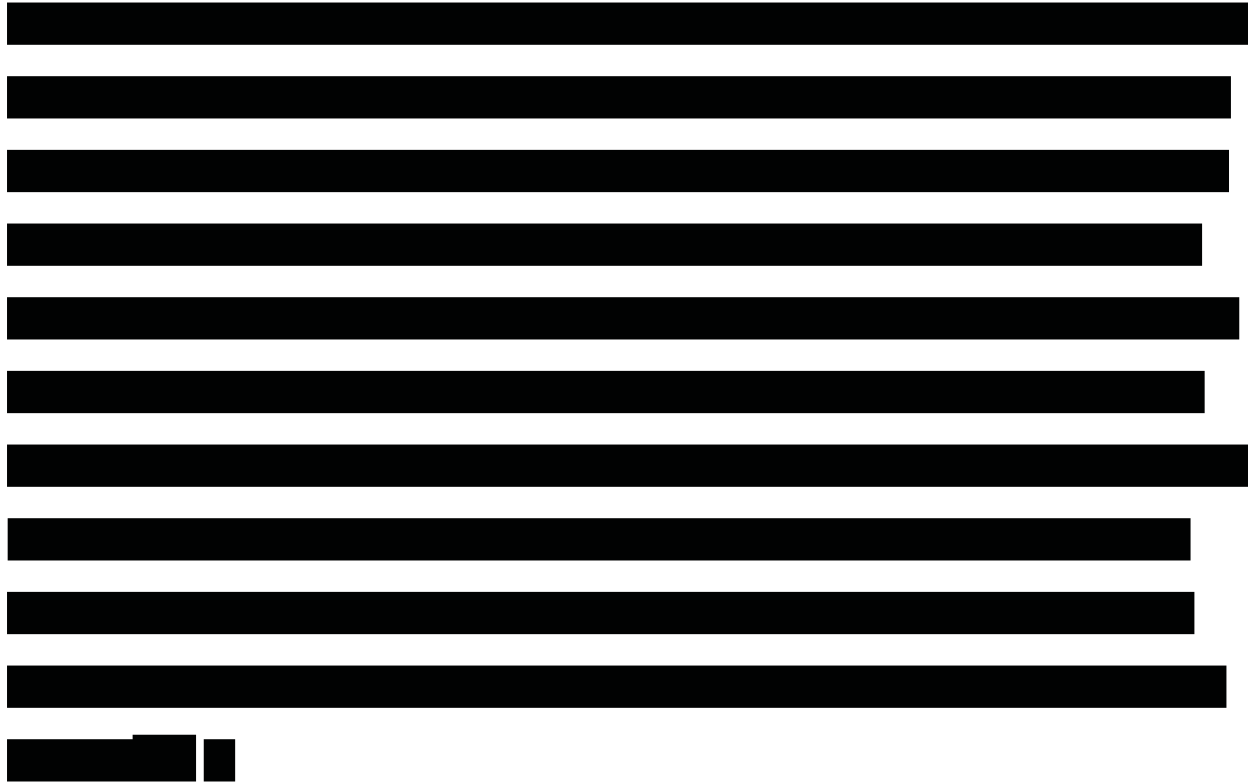
For example, in 2010, among the Women 18 – 49 demo, WE tv's primetime rating was [REDACTED] - about 50% higher than the demo's Total Day rating of [REDACTED] - while GSN achieved a [REDACTED] primetime rating a [REDACTED]% drop from its Total Day rating of [REDACTED]. As I suggested above in the HH rating discussion, the logical conclusion is that much more of the younger, working women population, unable to watch TV during the day, turned to WE tv than to GSN in primetime.

186. To better understand the compositions of the female viewing audiences of each network, I also compared each programming network's ratings in a much older female demographic, Women 65+ years of age. The networks' significant reversals in rating performance and ranking is telling and speaks directly to a critically important difference in the two networks' actual audiences. In this female senior demographic, GSN drew ratings [REDACTED]

<u>Women 65+ Rating - Total Day</u>		
	<u>2009</u>	<u>2010</u>
GSN	[REDACTED]	[REDACTED]
WE tv	[REDACTED]	[REDACTED]
Nielsen, Arianna version 8.3, NY Cable (Hardwired), Live + 3.		

187. In fact, while the ratings for the two networks in the aggregation of *all* adult women, *regardless of age*, (the composite, Women 18+), are fairly close [REDACTED], a breakdown of that aggregate by age groups evinces *exactly* which group(s) drive those

Women 18+ ratings for each network. As the bar graph below shows, [REDACTED]



188. Nielsen also provides the data to produce rankings of demos within a network's audience by their ratings ("Demo Ranker Report"). Again, the rankings indicate quite clearly

177 Nielsen, Arianna version 8.3, NY Cable (Hardwired), Live + 3, Average of 2009 and 2010 results.

how very different are the networks' actual audiences. [REDACTED]

[REDACTED]

189. In both 2009 and 2010, the highest ratings for GSN were achieved by [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

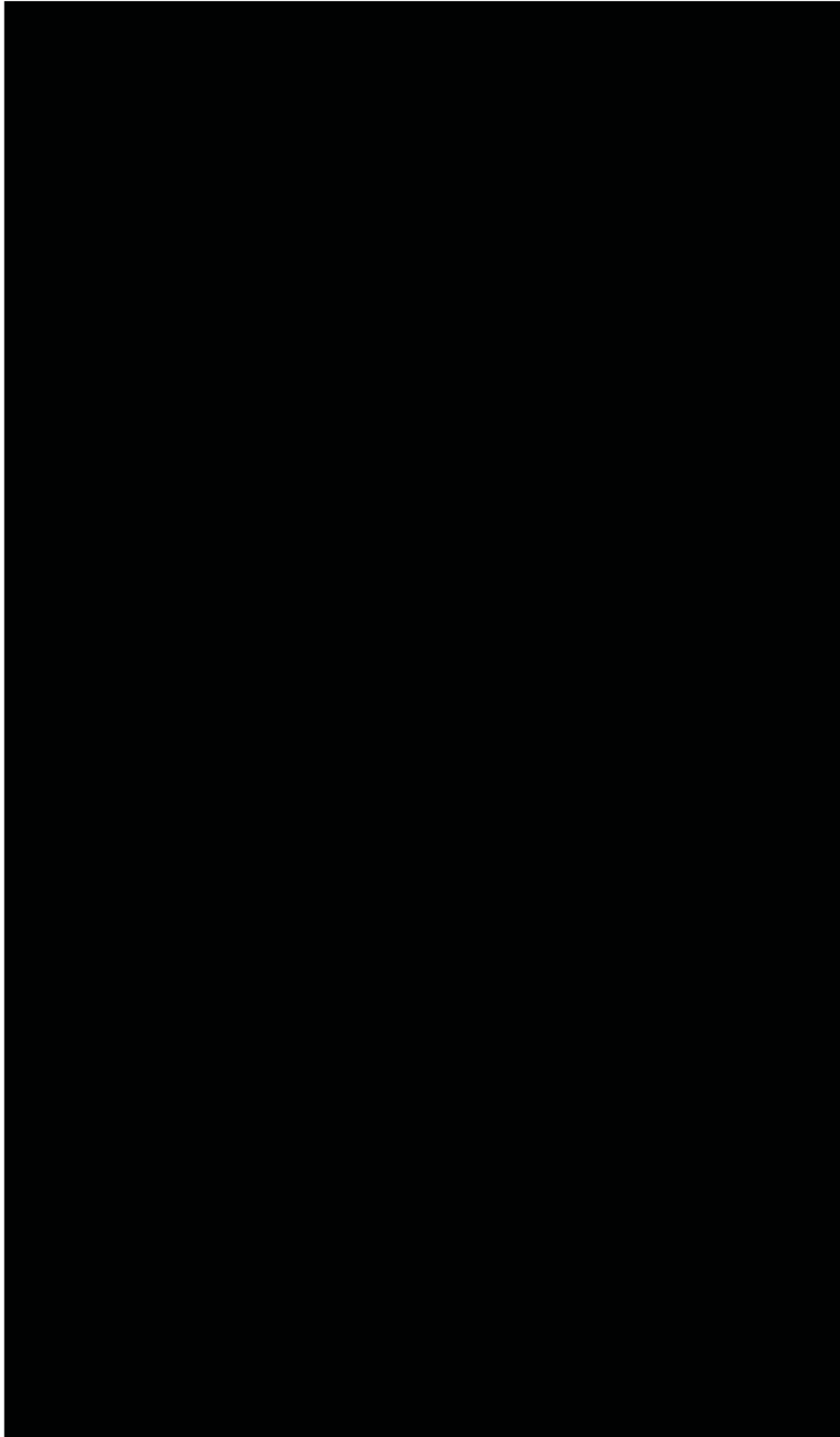
[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] 178

178 Due to ties for GSN's [REDACTED] rankings, 12 demos appear in 2009 and 13 in 2010.



190. Nielsen offers another report that identifies the compositions of the viewing audiences of these two networks, providing a direct look at their performances in the allegedly shared and competitive demos of Women 18 – 49 and 25 – 54. Its audience composition trends analysis report details the percentages of a network's adult audience (Persons 18+) contributed by specific demos. The data reveals that [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

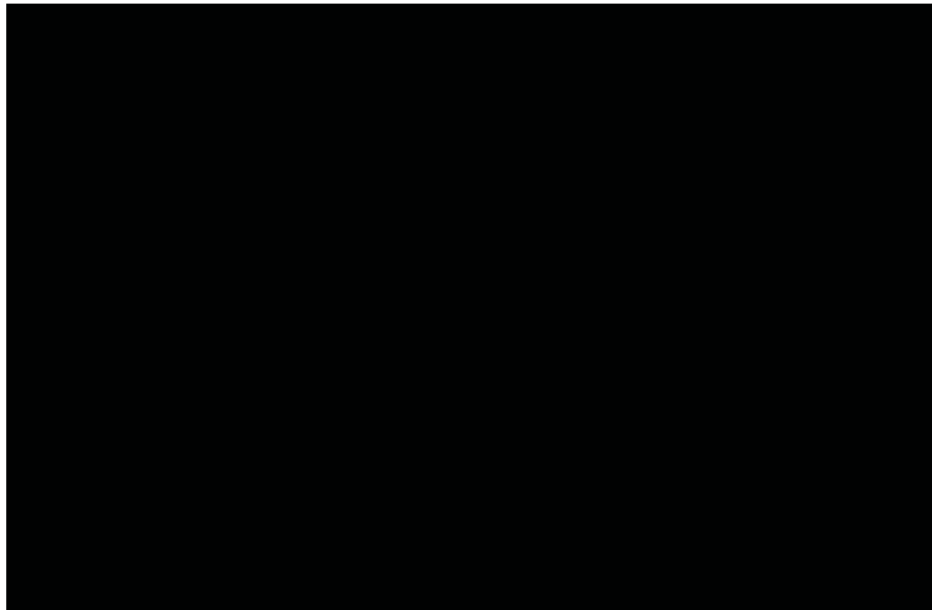
[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

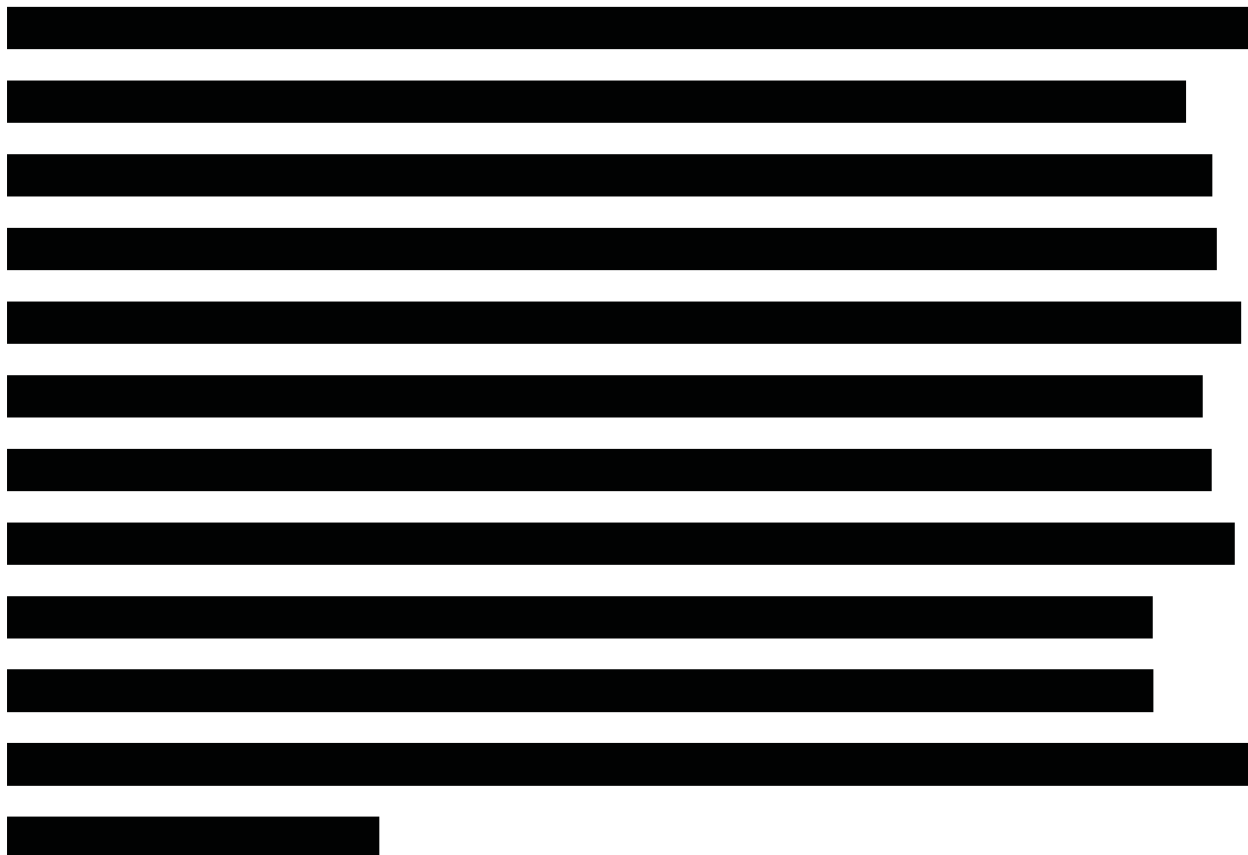
[REDACTED]



180 Nielsen, Arianna 8.3, NY Cable (Hardwired), Live+3, Total Day ratings, 1/1/2010 – 12/31/2010 and Nielsen Trends analysis report for the same period. The results for 2009 are virtually identical.

REDACTED – FOR PUBLIC INSPECTION

191. In order to examine an even closer fit with the cable system's geographical coverage and HH composition, I also obtained the Nielsen ratings for GSN and WE tv solely among Cablevision's households in the NY DMA. They are presented in the table below.



[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

RATINGS AMONG CABLEVISION'S HOUSEHOLDS

		<u>2009</u>		<u>2010</u>		<u>WE tv vs. GSN</u>
		<u>GSN</u>	<u>WE tv</u>	<u>GSN</u>	<u>WE tv</u>	<u>2009-10 Average</u>
HH	Total Day					
HH	Daytime					
HH	PrimeTime					
<u>Women</u>						
18 – 34	Total Day					
18 – 49	Total Day					
25 – 54	Total Day					
65+	Total Day					

Nielsen, NSI, Custom Daily Report, CV footprint, Live+3.

192. In summary then, regarding actual viewing audience, the available evidence is extensive and consistent. While GSN and WE tv share a similarity with many cable networks in the gross quantity of households watching at an *average moment* of the entire day, the similarities between the two end there. The significant differences in the Nielsen daytime and primetime HH ratings for the two networks make it clear that the quantities of households watching the two networks at any actual moment throughout that day are very different. And, [REDACTED], the quantities and percentages of Cablevision's subscribers that watch each network over the course of a calendar year are also very different.

193. Finally, GSN's viewing audience is not at all similar to WE tv's viewing audience in demographic composition, specifically and most pointedly, in the very demos alleged by GSN to be the audience target (and its definition of the competitive arena) for both networks, Women 18 – 49 and Women 25 - 54. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] As a result of these large differences in quantity and composition, it is

clear that GSN and WE tv are not similar in overall actual viewing audience.

**4. GSN Has Little In Common With The Other Members Of Its
Invention of “A Core Group Of National Cable Networks...
Predominately Viewed By Women.”**

194. Unable to demonstrate similarity with WE tv directly in programming or audience, GSN and Mr. Brooks invent a cable network club with each of WE tv and GSN as members, apparently hoping GSN will benefit by this fabricated association. The Complaint refers to GSN as “one of a core group of national cable networks...that are predominately viewed by women.”¹⁸¹ And Mr. Brooks writes, “I also considered GSN and WE tv...within the context of other women-targeted networks that are within those networks’ competitive frame”. He later refers to the group as “GSN’s competitive set.”¹⁸² They imply that GSN is similar in programming and audience to the other newly-installed club members, appointing Bravo, E! Entertainment, Hallmark, Lifetime, Oxygen, and OWN in addition to GSN and WE tv.

195. I have already demonstrated throughout this testimony that GSN is not similar at all to WE tv in programming, target audience, actual viewing audience, or the W18 – 49 and W

¹⁸¹ Complaint, ¶ 36.

¹⁸² Brooks 2012 Decl., ¶¶ 11, 20. Notably, Mr. Brooks compares ratings between GSN and his “competitive set” of “women-targeted networks” not by the pertinent demos of women 18 – 49 or 25 - 54 but by the non-distinguishing HHs and Persons.

25 - 54 demos of their actual viewing audiences. Although these other networks and GSN's core network club argument are irrelevant to GSN's claim of similarity to WE tv, even a brief examination of those other networks indicates that GSN appears to be dissimilar in programming to all of them, and its only significant commonality in audience seems to be with Hallmark Channel's strong appeal to older women.

196. Mr. Brooks makes it clear these networks aired very different programming than the Game Shows and poker Gaming shows on GSN in the relevant years. He describes Bravo as "documentary-style reality shows and an occasional movie"; E! Entertainment as "celebrity-oriented reality shows"; Hallmark Channel as "Family-oriented reruns [of Sitcoms and Dramas] and original and theatrical movies"; Lifetime as "original drama and comedy...documentary and competition-based reality...and original and theatrical movies"; Oxygen as "reality, competition, and documentary...theatrical movies and reruns"; and OWN as "documentary and theatrical movies."¹⁸³

197. To compare the networks' audiences by just the single element of overall audience gender skew, regardless of age, I obtained the GfK MRI 2010 and 2009 Doublebase reports for the NY DMA. When evaluating GSN's skew, it is important to keep in mind that television audiences skew female, on average. In fact, GfK MRI reports the *average* female skew among *all* national cable networks was [REDACTED] in both 2009 and 2010, so simply skewing female was not very distinguishing. *Degree* of skew *beyond the average* and *ranking* among networks are the more telling audience gender skew metrics.

198. Shown below is a ranking of the 33 national cable networks reported as having a female-skewed viewing audience in 2009 of the 58 total networks reported by GfK MRI.

¹⁸³ Brooks 2012 Decl., ¶ 11.

REDACTED – FOR PUBLIC INSPECTION

<u>2009 Rank By % Female of Audience</u>		<u>2010 Rank By % Female of Audience</u>	
<u>Network</u>	<u>%</u>	<u>Network</u>	<u>%</u>
STYLE	91.5	STYLE	87.8
OXYGEN	82.2	LIFETIME MOVIE CH	79.3
LIFETIME MOVIE CH	82.0	WE TV	79.4
SOAPNET	81.0	OXYGEN	77.8
LIFETIME	79.5	SOAPNET	77.8
QVC	79.2	QVC	78.1
WE TV	79.1	LIFETIME	76.4
HSN	75.6	HALLMARK CH	72.9
HALLMARK CH	72.6	HSN	72.0
DISNEY XD	68.9	ABC FAMILY	67.3
ABC FAMILY	68.2	FOOD	66.1
HGTV	65.1	HGTV	65.6
THE DISNEY CHANNEL	64.4	THE DISNEY CHANNEL	64.8
FOOD	64.3	NICKELODEON	63.3
NICK AT NIGHT	63.4	GSN	61.1
NICKELODEON	62.2	NICK AT NIGHT	60.6
BRAVO	61.9	BRAVO	60.6
TLC	61.4	TLC	60.0
E!	59.4	DISNEY XD	59.9
TV LAND	57.6	E!	57.7
GSN	56.9	A&E	54.5
BET	55.0	TV LAND	53.7
MTV	55.0	THE WEATHER CH	53.1
A&E	53.4	VH1	52.8
VH1	52.9	BET	51.9
TRUTV	52.2	ANIMAL PLANET	50.2
THE WEATHER CH	52.1	MTV	49.9
USA NETWORK	52.1	CARTOON NETWORK	49.7
MTV2	51.5	CMT	49.1
CARTOON NETWORK	51.2	TNT	48.9
TNT	50.7	USA NETWORK	48.6
ANIMAL PLANET	50.6	TRUTV	46.61
CMT	50.2	MTV2	44.05

199. The MRI data shines a spotlight on a select group of networks whose audiences exhibit a distinctly high female skew of [REDACTED] or more. It is 100% consistent over the two years, *i.e.* all such networks in 2009 also make the cut of [REDACTED] of their audience being women in 2010. Of course, WE tv is in the group each year via its [REDACTED] female skew. Of the other members Mr. Brooks and GSN appointed to its network club, Hallmark Channel, Lifetime, and Oxygen make the [REDACTED] cut in both years. OWN had not yet launched. GSN, Bravo, and E! Entertainment all fail to even approach the level to qualify for this group of highly female-skewed audience networks in either year.

200. Adding the other critical element of the audience demo - age - and then comparing GSN's "core" group of networks by ratings within the W18-49 and W25 – 54 demos claimed by GSN to be its target audience demonstrates that GSN is comparable only to Hallmark Channel in attracting this audience, falling far short of the others. And, at the same time, like GSN's, Hallmark's viewers appear to be heavily skewed to older women as indicated by its very high ratings among W65+. The table below shows the Total Day ratings in the three demos for the full year of 2010.¹⁸⁴

184 Nielsen, Arianna version 8.3, NY Cable (Hardwired), Live + 3, 2010, Total Day.

	<u>Ranked by W18-49</u>		
	<u>W18-49</u>	<u>W25-54</u>	<u>W65+</u>
OWN	████████	████	████
Bravo	████	████	████
E! Entertainment	████	████	████
LT	████	████	████
Oxygen	████	████	████
WE tv	████	████	████
Hallmark	████	████	████
GSN	████	████	████████

201. The GSN and Brooks claim that GSN is a member of its self-defined core group of eight competitive, women-targeted networks simply does not hold up under close examination. GSN's programming is very different from each of the other networks with which it seeks to be associated. Evaluated by female skew, GSN falls far below all but Bravo and E! Entertainment. And, evaluated by ratings in the important W18- 49 and W25 – 54 demos, GSN fails to measure up to all of its own club members other than Hallmark Channel.

C. Conclusions on Audience Similarity.

202. The objective evidence clearly identifies that the primary *target audience* of WE tv is Women 18 – 49 and 25 – 54. On the other hand, the facts indicate that GSN's primary *target audience* is far broader, *i.e.*, *all* Adults 18+. The Nielsen ratings, Audience By Network, demo rankers, and audience composition reports of the *actual viewing audiences* of the two networks reveal different performances for the two networks, WE tv reaches a far higher percentage of Cablevision's subscribers, draws far higher viewership than GSN in the demos of paramount concern in this analysis, Women 18 – 49 and 25 – 54, and obtains an adult audience composed mostly of women in that same age range. In contrast, the majority of GSN's adult

audience are women 55+, and it achieves much higher viewership than WE tv in the Women 65+ demo. GfK MRI reports that WE tv's audience is also significantly more female-skewed at [REDACTED] than GSN's is at [REDACTED]. The [REDACTED] female skew for GSN is reported by both the Cable Advertising Bureau¹⁸⁵ as well as GSN itself on its affiliate web site where its "Local Ad Sales" support materials claim the same [REDACTED] female skew for its actual viewing audience.¹⁸⁶

203. Having compared GSN and We tv in both target audience and actual viewing audience and found the networks to be very dissimilar in each case, it is clear to me that these two networks are not similar in audience.

D. Flaws In GSN's Discussions Of Audience Similarity.

1. Regarding Target Audience: GSN and Mr. Brooks fail to provide an analysis of the target audiences of GSN and WE tv.

204. Target audience is the demographic profile of the viewers who a network considers its highest priority to reach and who the network is actively seeking to attract. GSN and Mr. Brooks conflate *target* audience with *actual viewing* audience, and as a result, they fail to provide an authentic analysis and comparison of this criterion of the Second Report's similarly-situated rubric.

205. Rather than factually substantiate GSN's claim that it actively targets a specific audience demographic of Women 18 - 49 and 25 – 54 by showing that the network's target programming, web site, branding, public relations, and other external and internal efforts are intentionally and pointedly focused on ("aimed at") that audience demo, they focus on actual

185 <http://www.thecab.tv/php/networkprofiles/12profileData/2012pdf/12GSN.pdf>.

186 GSN affiliate web site last visited August 21, 2012.

viewing audience only. Their argument's logic is circular: target audience is best defined as *whoever happens to watch*. They conclude that since a modest majority of GSN's actual viewers are women, its target audience should then be defined as women.¹⁸⁷ Under that wildly-forgiving definition, every arrow shot, regardless of where it is aimed or lands, hits its intended target! As a result, the definition is faulty and their argument provides no support for their claim.

206. GSN's target audience definition carefully excludes the other demographic component that carries equal weight in defining the Complaint's claimed target audience, that is, age. As I have shown in detail in section VI. B., 3. – 4., above, GSN's female viewing audience skews far, far older than WE tv's, and the networks' audiences are thoroughly dissimilar in the allegedly-competitive W18 – 49 and W25 – 54 demos.

2. Regarding Actual Viewing Audience

a. Mr. Brooks's own data makes it clear that the national Nielsen ratings are not representative of the ratings of WE tv and GSN in the NY market.

207. As discussed in section VI. B. above, *national* research information is not relevant in a comparison of the actual viewing audiences of GSN and WE tv in Cablevision's New York City cable systems because the national sample was not intended to be and is not representative of Cablevision's subscribers. For the specific purpose of identifying viewership in New York, Nielsen created a New York sample which provides local viewership data, including that within Cablevision's cable system.

208. Nonetheless, Mr. Brooks chose to rely most heavily on the national audience data, focusing primarily on the broadest possible (and least responsive to the question of audience similarity) measurement units, Households and Persons, in which GSN ranked substantially

¹⁸⁷ Brooks 2012 Decl., ¶ 71; Reply, I. A. 2., p. 18.

higher than WE tv. Eventually, though, Mr. Brooks is forced to acknowledge the existence of the NY DMA Cable (Hardwired) ratings. These local ratings clearly indicate that WE tv outperforms GSN in the New York market of cable and telco systems, even in that broadest measurement, HH ratings. However, rather than acknowledge and explore the significance of the NY market's striking reversal of the relative rankings of GSN and WE tv by HH ratings (versus the national rankings), Mr. Brooks suggests the inexplicable interpretation that this dramatic change *somehow* "illustrates the strength of GSN both generally and relative to WE tv, irrespective of market."¹⁸⁸

209. Furthermore, while Mr. Brooks presents national data for the demos of women 18 – 49 and 25 – 54 showing that WE tv's ratings exceeded those of GSN by factors of [REDACTED] [REDACTED] respectively (differences he casually dismisses as will be discussed below),¹⁸⁹ he refrains from including these demos in his very limited depiction of NY DMA ratings. These female age groups being at the very heart of GSN's audience claim, Mr. Brooks should have compared those well-fit ratings along with the broad HH and all adult women (18+) ratings he presents in his discussion of local ratings. If he had done so, he would have shown that WE tv's local ratings in those Women 18 – 49 and 25 – 54 demos exceeded those of GSN by an even greater margin than they did nationally, by [REDACTED] to almost 300% in 2009 and 2010.¹⁹⁰

210. As these two examples illustrate, the NY cable market's viewership of GSN and WE tv differs significantly from that of the nation as a whole, and their national ratings do not reflect their viewership in New York.

¹⁸⁸ Brooks 2012 Decl., ¶ 35.

¹⁸⁹ Brooks 2012 Decl., ¶ 25.

¹⁹⁰ See section VI. B. 3, above.

b. Mr. Brooks's characterizations of significant differences in GSN and WE tv national and local ratings as meaningless and the local Nielsen ratings as unreliable are not substantiated.

211. In his 2012 declaration, Mr. Brooks claims that the differences between the WE tv and GSN *national* ratings among the critically- important Women 18 – 49 and 25 - 54 demos are “so small that I would consider them essentially tied in these metrics,” and, “It is important to remember that the differences observed are measured in hundredths of a rating point,” strongly implying that small ratings cannot be read as exact.¹⁹¹

212. Mr. Brooks made these brusque comments in spite of the fact that WE tv's ratings exceeded those of GSN in these key demos by factors of [REDACTED], respectively. While questioning these large differences, Mr. Brooks does not present himself as an expert in statistical analysis and makes no attempt to validate his conclusion that the ratings of the two networks are “essentially tied” by testing whether the differences in ratings between WE tv and GSN are statistically significant.

213. Mr. Brooks also attempts to portray the *local* NY Cable (Hardwired) ratings – which, year after year, clearly evince the substantial dissimilarity of the GSN and WE tv audiences, most starkly in the allegedly-shared target demos - as unreliable.¹⁹²

214. He alludes to the size of the local sample as problematic because it is smaller than the national sample size, yet he fails to acknowledge that its 750 households constitute a robust sample size, carefully composed by Nielsen for this very purpose, producing stable ratings with reasonable and customary reliability. The only purpose of the Nielsen sample is to *project* to the

¹⁹¹ Brooks 2012 Decl., ¶ 25.

¹⁹² Brooks 2012 Decl., ¶¶ 17, 32 & n.26.

entire DMA's more than 6,000,000 wired homes, so a WE tv rating of [REDACTED] actually represents almost [REDACTED] homes.

215. Mr. Brooks's critiques cascade to a self-serving conclusion of doubt about the significance of the local ratings, especially in the specific women's demos of critical importance in this proceeding, and he opines that differences of hundredths of a rating point "may not be meaningful."¹⁹³ As was the case for the national ratings that he questioned, Mr. Brooks once again fails to substantiate his opinion.

216. As detailed in my viewing audience analysis section VI. B. 3. above, the NY 2009 and 2010 Total Day ratings among Women 25 – 54 for GSN were [REDACTED], while for WE tv they were [REDACTED], making the averages for the two years [REDACTED] for GSN and [REDACTED] for WE tv. We tv's rating is nearly *three times* that of GSN and the separation is not "hundredths of a rating point" but *more than one tenth*. WE tv's ratings among Women 18 – 49 exceed those of GSN by even greater margins in these same years.

217. Hundredths of a rating point separations in these demos are typical in the industry and are the margin of difference year after year for many, many cable networks. Moreover, it is Nielsen's standard procedure to note in its reports any data it considers unreliable. Nielsen has not made any such notifications regarding these ratings. And, if the ratings were unstable, making these differences too small to distinguish the networks' performances, then the GSN and WE tv ratings should not demonstrate the year to year consistency they do in 2009 and 2010.

¹⁹³ Brooks 2012 Decl., ¶ 32.

- c. **The GSN ratings within Cablevision’s NY households provided by Mr. Brooks do not agree with the Nielsen data I obtained for the same customers, and the snippets of data included by Mr. Brooks are carefully-selected, unrepresentative, and misleading anomalies. A review of the full years’ data makes it clear how dissimilar these networks actually are in viewing audience.**

218. In an effort to counter the impact of the local NY Cable (Hardwired) ratings showing that GSN’s actual viewing audience is very dissimilar to that of WE tv (as detailed in section VI. B. 3. above), Mr. Brooks obtained a customized version of national Nielsen rating report that used the national sample to produce local ratings for Cablevision’s NY DMA subscriber households. He then presented data for a few demos from just one quarter of 2010 (“Q2 2010”),¹⁹⁴ making the claim that these ratings “demonstrate the similarity of GSN and WE tv in demographic ratings among Cablevision subscribers.”¹⁹⁵ I also obtained the Nielsen ratings in Cablevision’s footprint for the two networks; however, my reports took a more customary approach than those of Mr. Brooks by using Nielsen’s local, New York sample. These reports revealed viewership for the full years of 2009 and 2010, and I presented that in section VI. B. 3., paragraph 191, above.

219. In addition to the two full years’ ratings, I also obtained the ratings within Cablevision’s households for each of the four quarters of 2010, again using Nielsen’s local, NY sample. Comparing the data I obtained to that presented by Mr. Brooks, I find that its GSN ratings are extremely different than those he presented. While his ratings for WE tv are exactly the same as those I obtained in two demos (W18-49 and W25-54) and reasonably similar

¹⁹⁴ Brooks 2012 Decl., ¶¶ 45 - 46.

¹⁹⁵ Brooks 2012 Decl., ¶ 44.

██████████ in the third demo (W18+), Mr. Brooks’s GSN ratings in all three demos are comparatively overstated, by large margins of ██████████, as shown in the table below.¹⁹⁶

<u>Comparison of Total Day Ratings, Q2 2010</u>						
<u>Among Cablevision’s NY Households</u>						
	<u>W18+</u>		<u>W18-49</u>		<u>W25-54</u>	
	<u>Brooks</u>	<u>Egan</u>	<u>Brooks</u>	<u>Egan</u>	<u>Brooks</u>	<u>Egan</u>
GSN	██████████	██████████	██████████	██████████	██████████	██████████
WE TV	██████████	██████████	██████████	██████████	██████████	██████████

Nielsen, NSI, Custom Toolbox, CV footprint, Live+3, Q2 2010, Total Day.¹⁹⁷

220. The accuracy of his GSN ratings is the first of two problems that arise upon review of Mr. Brooks’s data. The second concerns the representativeness of the very brief time period he chose to display. Mr. Brooks focuses exclusively on *one particular quarter*, yet he makes sweeping claims regarding long term similarity. This approach is proven to be not credible when one realizes that Q2 2010 is a very favorable irregularity for GSN’s comparative cause since its ratings are uncharacteristically high, while WE tv’s are atypically low. As a result, the Q2 ratings are *not* representative of either network’s ratings for 2010 (or 2009).

221. In two of the three demos Mr. Brooks quotes, Q2 produced GSN’s highest quarterly ratings of the year. In all three of the demos he presents, GSN’s Q2 ratings were far higher than its full year 2010 ratings, ranging from ██████████ higher. At the same time,

196 Mr. Brooks used 24 hours to define Total Day. As explained earlier in this testimony, in all ratings and for all networks, I eliminated the “infomercial” hours of 4am – 9am to enable comparisons in programming hours. To be absolutely sure that this was not the cause of the differences in these GSN ratings obtained by me and Mr. Brooks, I had the ratings run on a 24 hours basis as well. As expected, this was not the source of the discrepancies. Both networks were affected similarly by the change in hours, and both networks’ 24 hour Total Day ratings suffered a decline of an average of approximately 15% from their ratings under the 9am – 4am Total Day definition.

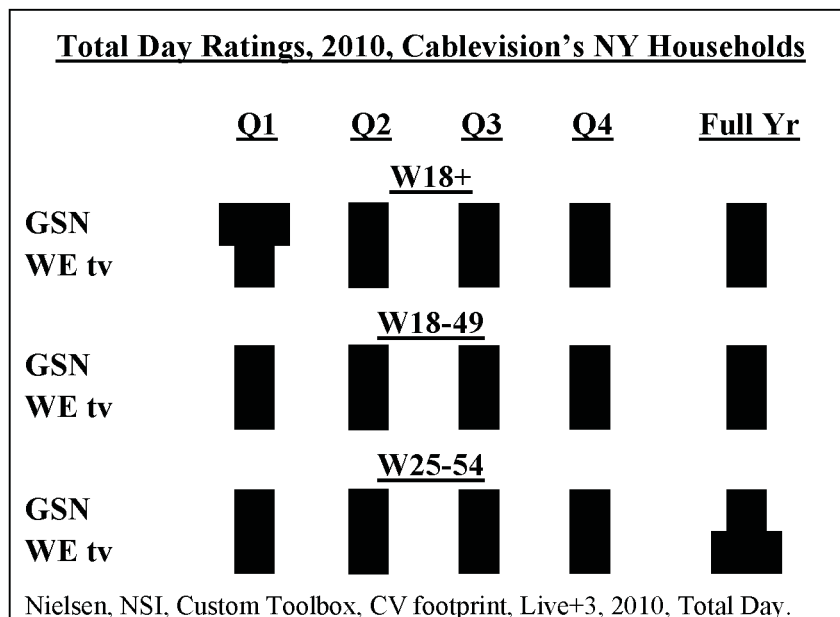
197 The ratings are of all Cablevision HH. Since both GSN and WE tv were carried on the Expanded Basic service level (Family Cable) during this time, each was available to the same number of HH which averaged ██████████% of all Cablevision HH. If network-level coverage ratings were to be manually calculated for both networks (Nielsen does not provide coverage ratings in local markets), the networks would be affected equally, and their ratings would increase by one to two hundredths of a rating point.

in every demo, [REDACTED]

[REDACTED]! Quoting just the one abnormal quarter whose ratings were favorable to GSN's claim when several full years' ratings are readily available – and which make clear that Q2 is an aberration - gives the appearance of presenting cherry-picked evidence and advocacy rather than objective analysis.

222. Since the ratings are not representative of the performances of GSN and WE tv in 2010, they do not substantiate in any way Mr. Brooks's sweeping claim of "similarity of GSN and WE tv in demographic ratings among Cablevision subscribers."¹⁹⁸ The table below displays the Nielsen ratings I obtained. As one can readily see, the full year's data clearly demonstrates the fallacy of Mr. Brooks's suggested interpretation, revealing the overwhelming dissimilarity of GSN and WE tv in the W 18 – 49 and W 25 – 54 demographic ratings among Cablevision's subscribers. As mentioned earlier, a complete set of GSN and WE tv ratings for two full years is provided in section VI. B. 3, above.

¹⁹⁸ Brooks 2012 Decl., ¶ 44.



3. Regarding Cablevision's STB Data And Audience By Network Reports.

223. Mr. Brooks devotes a significant portion of his 2012 declaration to attacking [REDACTED], and the usefulness of the information in making program carriage decisions.¹⁹⁹ Putting aside his criticisms of the reliability of the [REDACTED] data (my understanding is that they will be addressed by Jonathan Orszag in his testimony), I will respond to just two of Mr. Brooks's erroneous statements.

a. Mr. Brooks misrepresents the importance of the reach metric.

224. Mr. Brooks states, "Reach is not a particularly useful measure of the popularity of a channel."²⁰⁰ This seems to be an inexplicable point of view for someone familiar with the available evidence to profess. [REDACTED]

¹⁹⁹ See Brooks 2012 Decl., ¶¶ 15, 18, 44, 47 - 64, 88 - 89.

²⁰⁰ Brooks 2012 Decl., ¶ 55.

[REDACTED]

225. This is all consistent with my own experience operating cable systems and working as a consulting partner to both small and large cable operators. As I explain in that section above, “Reach is especially insightful information for an MVPD because its revenues are almost entirely based on month-to-month subscriptions. Whereas ratings are important to an advertiser because they report the raw number of *undifferentiated* viewers at a moment in time, reach indicates the percentage of *unique (different)* subscribers that actually watch a channel over the month and year, providing the MVPD with some insight into how useful and valuable the channel is across *all* of its customer base.”

b. Mr. Brooks misrepresents the reach metric’s results.

226. Mr. Brooks makes another erroneous statement, this time regarding the results of the reach metric [REDACTED]. He claims, “Accumulating reach over a very long period of time (e.g. a year, as is the case here) is virtually meaningless. If the period is long enough, and the bar set low enough, every channel is most likely tuned to at some point.”²⁰² This is wholly inaccurate as shown in the results for WE tv and GSN that I presented above in section VI. B. 2.. [REDACTED]

201 Cablevision Answer, Exhibit D, Declaration of Thomas Montemagno, Senior Vice President, Programming Acquisition, ¶ 41.

202 Brooks 2012 Decl., ¶ 55.

4. Mr. Brooks and GSN Misrepresent The Design Intent And Purpose Of The Beta Research Study. It Is Not Used By Cable Operators As A Subscriber Satisfaction Survey, But Rather, It Is Employed By Networks As A Sales Tool.

227. Mr. Brooks calls this study the “Beta Basic Cable Subscriber Study” and claims it is “the best known and most widely used impartial, third party survey of cable subscriber satisfaction.”²⁰³ Neither of these statements is correct, and each of his errors was pointed out long ago in this proceeding.²⁰⁴ Yet they are repeated in his most recent declaration, once again in an attempt to equate this boilerplate survey of *national* viewership of *some* cable networks with the customized studies employed by MVPDs to measure satisfaction levels of their subscribers with their video, internet, and phone services. Apparently, Mr. Brooks seeks to create an appearance of legitimacy for his claim that the Beta study should be seen as a measure of the values estimated for these two networks by the average Cablevision subscriber and that Beta’s studies are “widely used” by cable operators.

228. It is common knowledge in the cable industry that the name of this annual Beta Research Corp. study is “Cable Subscriber Study – *Evaluation of Basic Cable Networks*” (emphasis added). As its true name makes clear, and as is also widely understood in the industry, it is *not* a *cable subscriber* satisfaction survey, but rather, a study of viewership of and

203 Brooks 2012 Decl., ¶ 65.

204 See CV Exh. 230 (Egan Ex. 12, II. C).

attitudes toward some *cable networks*. Moreover, the survey omits many of the networks the typical cable system carries.²⁰⁵

229. Cablevision does not purchase the study and does not use it in making carriage decisions.²⁰⁶ I did not use the Beta Research survey in making carriage decisions during my 19 years as programming chief for cable operators, nor have I used it in the subsequent years in any of multiple programming assignments analyzing network carriage that I've performed for both large and small cable operators. In fact, in spite of Mr. Brooks's declaration's misleading statements to the contrary, while virtually *all* cable operators of significant size regularly perform subscriber satisfaction studies, I am not aware of even one that uses this study for that purpose. And, my experience is that few purchase the Beta study for *any* purpose. Several long-established industry business reasons explain why.

230. First, as mentioned above, this Beta study is not a subscriber satisfaction survey at all. My experience is that a cable operator is primarily concerned with subscriber satisfaction (and its impact on retention) with the many business elements it controls, such as retail pricing, signal quality, response and resolution time of calls to customer service, internet service speeds,

205 For example, the Beta survey omits more than 25 English-language basic cable networks carried by Cablevision as part of its Expanded Basic service in NY as of 11-25-12, including Bloomberg TV, Disney Jr., History International (H2), Universal HD, CSPAN, Discovery Crime and Investigation, Yankees Entertainment & Sports Network (YES), Madison Square Garden Network, Sports NY, News 12, News 12 Traffic and Weather, ReelzChannel, Home Shopping Network, Daystar, and fuse. See the list of networks included in the 2010 Beta study at CV Exh. 230 (Egan Ex. 20) and Cablevision's "Optimum Value" expanded basic programming network list for the community of Woodbury in the NY system at http://www.aitrk.optimum.com/ratecard.jsp?jsessionid=D0136A307CF11C6BD2AD95CEAC9AD0AD?searchby=corp&corp=07801&serviceType=io&z=11753&_requestid=236445.

206 Cablevision has not purchased and used this Beta Research study since at least 2008. AMC Networks Inc., owner of WE tv, last had a subscription to this Beta Research survey in 2009. Mr. Brooks's 2012 Declaration appears to be misleading in paragraph 65 when it says "Cablevision itself has used Beta Research results in attempting to get its networks carried by other MVPDs." Beta Research fields multiple different studies of different populations and different subjects for different purposes every year. Mr. Brooks seems to conflate the Beta Research study he has quoted extensively - the "Cable Subscriber Study - Evaluation of Basic Cable Networks" - with a completely different Beta Research study, the "Cable Operators: Interest in Carrying Emerging/Digital Networks" which queries cable *operators*, not subscribers, and their intentions to add cable networks to their systems in the future.

digital phone features, billing questions, installations, upgrades and downgrades, the depths of the VOD and TV Everywhere menus, etc. As a result, these are some of the areas regularly probed in a cable operator's customer satisfaction survey. Satisfaction levels for the hundreds of video services already being carried are not usually survey topics because the operator has no control over their programming. And, if a major cable operator seeks research regarding programming networks due to carriage negotiations or changes in its distribution it is considering, it is far more likely to rely on its own, commissioned research, focusing on *its* subscribers and the channels specifically under consideration at that time, instead of an incomplete and unrepresentative, national study.

231. Second, because the Beta study is a *national* study, its results do not express the viewing of the subscribers within the cable operator's footprint or include many of the channels the systems carry. In fact, while the 2008, 2009, and 2010 studies included respondents from several locations across the United States, *not one* of the respondents in any of those years *was a Cablevision subscriber in its NY system!* There is no basis for projecting results from this wholly unrepresentative national sample to Cablevision's subscribers and Cablevision's system.

232. The Brooks declaration is also inaccurate as well as misleading when it states that "it is clear from this data that 'subscribers' feel that GSN and WE tv are extremely similar in terms of overall perceived value."²⁰⁷ Actually, the results for the value and satisfaction questions included by Mr. Brooks represent the opinions of a small subset of all "subscribers," that is, just those who identified themselves as *viewers* of the networks. Mr. Brooks's reckless extrapolation here is similar to asking a customer eating ice cream in a Ben & Jerry's store if he/she likes Ben & Jerry's ice cream and then claiming those results speak for *all* Americans! Generally, less

207 Brooks 2012 Decl., ¶ 66.

than one-third of all subscribers are actually even occasional viewers of most of these networks; consequently, all of these scores of value, satisfaction, quality, and importance *speaks only of a minority of subscribers'* opinions.

233. Notably, rather than use the most current year's (2010) Beta study results, the Brooks declaration averages three years' (2008, 2009, 2010) results. As footnote 61 to the declaration states, Beta radically changed its methodology in 2010, resulting in significantly lower or higher scores across the board. Averaging the three years with equal weight as Mr. Brooks does is statistically invalid.

234. In summary, the cable operator community generally does not consider the Beta study to be an indicator of value and subscriber satisfaction among its subscribers as claimed by Mr. Brooks. In sharp contrast, cable operators generally perceive the Beta study as a sales tool used by those programming networks that paid to be included, scored relatively well, and are seeking a new or revised contract with greater economic benefit for the network, such as expanded carriage and increased license fees.

5. The Price Per Rating Point/Ratings-Adjusted Price Metric Cited By Dr. Singer Is Not Designed For Or Intended To Be Used By A Cable Operator When Making Carriage Decisions. As A Result, It Does Not Include Most Of The Factors Considered By An MVPD When Making Such Evaluations.

235. In his report, Dr. Singer claims that his formula of dividing a cable network's license fee by its national Total Day HH ratings to reach what he labels a "price per rating point" and "ratings-adjusted price" demonstrates that, in 2009, GSN was not mispriced to Cablevision relative to some other networks, including WE tv, because his calculation produces a [REDACTED] result for GSN than it does for WE tv. Later, he states that GSN is "comparably valued to WE tv even in the New York DMA" because his formula produces a similar result for each network

when using NY DMA, rather than national, ratings. He further explains the basis of his theoretical formula, claiming that “a higher rating generates more value for the cable operator.”²⁰⁸

236. Dr. Singer adapts a financial metric found in an SNL Kagan publication used by investors, lenders, and, perhaps, cable networks. According to Dr. Singer’s footnotes 71 and 72, “academics” have also used this computation to study the advertising industry, and “an economist . . . can model Cablevision’s conduct *as if* the company considers this metric.” What he fails to consider, and what renders his recipe meaningless, is that, historically, *cable operators* typically have not used this formula in running their businesses.

237. SNL Kagan’s formula is not designed or intended for use as an operating tool by a cable distributor for making programming carriage decisions; moreover, it would be grossly inadequate for that purpose because it fails to include multiple, critical business marketplace factors that an MVPD, such as Cablevision, typically considers in making network evaluations. As a result, it is not an MVPD standard. And, I don’t recall ever having been aware of an MVPD relying on Dr. Singer’s formula when making a carriage decision.

238. Dr. Singer’s formula is wholly dependent on his claim that ratings alone determine whether or not a network is valuable to a cable distributor and if its license fee is justified. This claim is erroneous, mistaking the imperatives of cable networks for those of cable distributors. It is my experience that cable *networks* often place this paramount importance on ratings because the numbers, along with price, are virtually the only factors driving the advertising revenue which generally represents about one-half of the network’s total revenue. However, cable *operators* typically prioritize a network’s contribution to the multiple

²⁰⁸ Singer Report, ¶¶ 52, 54.

components of subscriber satisfaction, acquisition, and retention which generate the month-to-month subscriber revenues constituting *almost the entirety* of the distributors' video revenues. In the case of Cablevision, in each of the last two fiscal years (2010 and 2011), [REDACTED]

[REDACTED]

[REDACTED]²⁰⁹

239. A formula accurately gauging a major MVPD's evaluation of a cable network and its license fee would be far more comprehensive than Dr. Singer's with its exclusive reliance on ratings. In my experience, while Total Day ratings could be included as one element of an MVPD's deliberation, numerous additional economic, programming, and brand awareness factors affecting the operator's subscriber-oriented priorities would typically be given equal or greater weight. These include: the operator's strategic initiatives, both retention-oriented (such as cost control and TV Everywhere) and acquisition/upgrade-oriented (for example, foreign-language or sports network tiering); the programming's brand, talent, and genre popularity and the network's promotional commitments to exploiting them; the added-value content elements of uniqueness, originality, exclusivity, breadth, quality, and reach within the subscriber base; and customer requests and feedback (including defections due to not carrying the network and acquisition opportunities as a result of adding it). As WE tv's President and General Manager, Kim Martin, explained during her deposition in this proceeding [REDACTED]

[REDACTED]

209 Cablevision Systems Corporation, Form 10-Ks, for the fiscal years ended 12/31/10, p67, and 12/31/11, p. 56, available at <http://www.cablevision.com/investor/sec.jsp>.

[REDACTED]

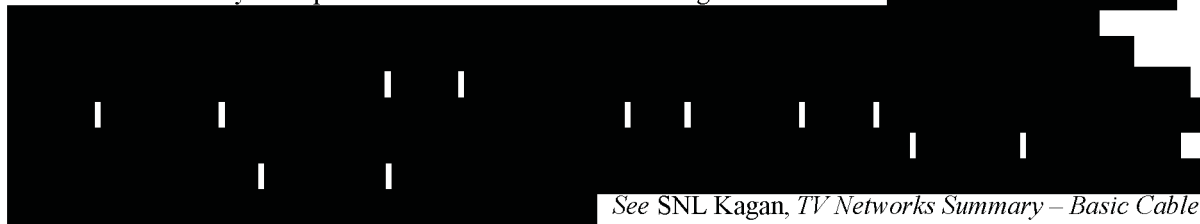
[REDACTED]

240. Obvious examples of the greater influence of some these factors, namely brand recognition and popularity, exclusivity, and customer input, versus that of ratings, are the many national and regional sports networks that are able to obtain the highest license fees, yet do not attract the highest Total Day ratings. Others are certain niche networks, such as MTV and CSPAN, which embody one or more of these elements, and, as a result, have been able to demand license fees higher than their ratings alone would justify. In fact, ratings are not even reported for CSPAN, yet it is universally supported by MVPDs.²¹¹

241. Of course, in addition to omitting all of these considerations, Dr. Singer's formula also fails to recognize that an operator's evaluation of one cable network typically does not occur in isolation. Carriage decisions and license fees are significantly influenced by the harsh marketplace reality that a handful of media companies control most of the most popular broadcast and cable networks. As a result, the license fee or the amount of the increase in a license fee and the carriage penetration level negotiated for one cable network is typically greatly influenced by the carriage or state of negotiations regarding carriage of another broadcast and/or cable network owned by the same media company.

210 Deposition of Kimberly Martin, January 15, 2013, pp. 193-194.

211 Just some of the many examples of the disconnect between rating and license fee:



See SNL Kagan, *TV Networks Summary – Basic Cable Networks by Affiliate Revenue Per Avg Sub/Month (\$)(2008-2015)* and *Networks Summary – Basic Cable Networks by Average 24-Hour Rating (2008-2015)* both available at http://www.snl.com/interactivex/tv_NetworksSummary.aspx (subscription required) (last visited Nov. 13, 2012).

242. I note that a recent electronic edition of the industry trade publication *Multichannel News* included two stories of cable operators signing carriage agreements with programmers, one for the renewal of networks long-carried and one for the launch of a new network. In describing the value of the networks to be carried, the reports did not mention their ratings at all, instead pointing to the significance of many of the factors I mention above: brand and genre recognition and popularity; the operators' strategic initiatives of tiering, VOD, and TV Everywhere; and the bundling of cable network contracts with broadcast station retransmission consent.²¹²

243. While the opinions presented above are complete based on the information and documents made available to me, I reserve the right to expand, modify, or reduce my above findings and conclusions based on my review of any further disclosures made by any other expert, all information or documentation provided in this matter, or on testimony and exhibits introduced at any further time.

²¹² See <http://multichannel.com/cable-operators/cablevision-nbcu-strike-carriage-deal/140128> and <http://multichannel.com/distribution/bein-sport-nets-distribution-deals-twc-bright-house/140129>.

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I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge, information, and belief.


Michael Egan

Dated: March 12, 2013

APPENDIX A

Appendix A:
Materials Relied on in the Expert Testimony of Michael Egan

PUBLICALLY AVAILABLE MATERIALS

2009, 2010, 2011 programming schedules for GSN

2009, 2010, 2011 programming schedules for WE tv

2010 programming schedule for Wedding Central

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WE tv 2012-2013 Upfront Presentation (Exhibit 5)

WE tv Affiliate Sales Team Presentation to Comcast (Exhibit 4)

WE tv Fact Sheet (2010/2012) (Exhibit 15)

WE tv Internal Competitive Tracking Reports (Exhibit 16)

WE tv Market Breaks – 1Q11 (Exhibit 15)

WE tv Presentation to Comcast Regarding African American Audience (Exhibit 17)

WE tv Presentation to MVPD Affiliates regarding “WE Empowers Women” Public Affairs Program (Exhibit 14)

WE tv Presentations to MVPDs (Exhibit 12)

WE tv Presentations to National Advertising and Programming Communities (Exhibit 13)

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